



# Essays

on the

# Conflict of Laws

by

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# Preface

This book includes, but is something more than, a collection of articles and case comments published from time to time during a period of more than fifteen years. Chapters one and two have been written by way of introduction, and some other chapters or parts of chapters have not been hitherto published, (as, for example, chapters eleven and thirteen, and the first section of chapter six). Furthermore, all the articles and comments republished herein have been revised, so as to co-ordinate the contents of the book as a whole (not to speak of correcting some of my own mistakes or recording changes in my own opinions). Many passages have been omitted or condensed and many cross-references inserted, with the view of avoiding the repetition or overlapping necessarily incidental to articles and comments which were written on various occasions with regard to particular topics, but which involved the exposition of some general theories with regard to the common subject of the conflict of laws. Some supplementary observations have been added in various places.

Many topics of the conflict of laws are discussed, and in order to facilitate reference to particular topics I have included in the table of contents the titles of the different sections into which some of the chapters are subdivided, and have attempted in the index to refer to various topics from every possible point of view.

The book contains many references to Dicey on the Conflict of Laws and some criticism of the views of Dicey and of Keith (the editor of the fifth edition, 1932) on various points. Much of this criticism may of course become inappropriate to the forthcoming sixth edition of Dicey, now in course of preparation under the skilled and enlightened editorship of Mr. J. H. C. Morris.

Having mentioned Dicey, I take advantage of the opportunity to make my apology in this place to Professor Yntema for having, on page 233, by a slip of the pen, misquoted two words from his phrase that "in England, Westlake bridged the way to Dicey's Anglican positivism."

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## CHAPTER I.

# THE LAW OF THE FORUM: DOMESTIC RULES AND CONFLICT RULES

Westlake, in 1858, began his *Treatise on Private International Law or the Conflict of Laws* with the following definition:

Private International Law is that department of private jurisprudence which determines before the courts of what nation each suit should be brought, and by the law of what nation it should be decided.

In the second (1880) and subsequent editions of his *Private International Law*, however, the author, more cautiously, omitted any formal definition of the subject, and began his discussion as follows:

Private international law is that department of national law which arises from the fact that there are in the world different territorial jurisdictions possessing different laws.

I have quoted Westlake's ~~discarded~~ definition of the subject of his book merely for the purpose of using some of the expressions occurring in it as the basis of discussion. As will appear subsequently in the present book, I do not acquiesce in the theory, implied in the definition, that a court of a given country may or should apply any law other than the law of that country. In some circumstances, however, a court may and should refer to or consult foreign law, and apply rules of law—part of the law of the forum—modelled to a greater or less degree on rules of foreign law (*a*).

"Nation", used by Westlake in his definition as the designation of a territorial unit for the purposes of the conflict of laws, was in accordance with Story's language, although Story occasionally said "state" or "country". The use of the noun "nation" in this sense is no longer common in English, but the adjective "national" is still occasionally used in connection with "law" to designate the law of a territorial unit in the conflict of laws, and the adjective "international" still occurs in the title *Private International Law*, with its implied reference to different "nations" and their different systems of law. The use of "jurisdiction" to designate such a territorial unit is not uncommon, especially in the United States of America, but this

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(*a*) See chapter 2, § 2 (2) (3).

use of the word, whether preceded by "territorial" as in Westlake, or not, would seem to be open to objection, because "jurisdiction" is in general use in connection with the competence of courts, and is also sometimes used in connection with legislative power, and is less appropriate as the designation of a territory. It seems preferable to use the word "country", as Dicey does, distinguishing it from "state", the former in the sense of "the whole of a territory subject under one sovereign to one system of law", and the latter in the sense of "the whole of the territory (the limits of which may or may not coincide with those of a country) subject to one sovereign" (b). It is true that in the United States "state" is commonly used in the sense of a country as defined above (c), and this is natural in view of the fact that a state of the United States is itself a good example of a territorial unit for the purposes of the conflict of laws, as is also a state of the Commonwealth of Australia. In Canada, where the territorial units for this purpose are called "provinces" (d), the use of "state" in this sense is less natural than it is in the United States, and in the United Kingdom it is still less natural to designate England (and Wales), Scotland and Northern Ireland as "states". On the whole the word "country" is relatively unencumbered with technical implications, and its use in the conflict of laws is supported by a long tradition in the English language. As Dicey says, there is no satisfactory English substitute for "country" as above defined, but he suggests that it might (on the analogy of the Latin *territorium legis* and the German *Rechtsgebiet*) be called a "law district" (e). The outstanding merit of Dicey's coined expression "law district" is that it has an exact technical meaning. Although, generally speaking, the use of "country" in the same sense is less artificial, it

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(b) Dicey, *Conflict of Laws* (5th ed. 1932) 50.

(c) Cf. *Conflict of Laws Restatement*, § 2. As noted in comment c the word "nation" is used to designate a "politically sovereign unit".

(d) *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, at p. 450, [1926] 2 D.L.R. 762, at p. 765, [1926] 1 W.W.R. 742, at p. 745.

(e) Dicey, *Conflict of Laws* (5th ed. 1932) 53. As to "law districts", see especially the detailed discussion contained in Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938), chapter 1. At p. 6, he approves of Dicey's definition of law district (country) if the word "body" is substituted for the word "system", the characteristic of any law district which makes it legally "foreign" to another being that it is a unit of territory which has a body of law peculiar to it.

happens occasionally that in a particular context it is natural to use "country" in a wider sense, and in that context the use of "law district" instead of "country" in the narrower sense avoids any ambiguity.

A "state" as defined by Dicey or a "nation" as defined by the Conflict of Laws Restatement, may be unitary, in the sense that it consists of a single law district, or it may be composite, in the sense that it includes two or more law districts, each law district being by definition unitary. It may be assumed for the purpose of the present discussion that each law district is also unitary in the sense that it has a single system of territorial law as contrasted with a law district that is composite in the sense that it has a system of personal laws differing *inter se* for different classes of its inhabitants (*f*).

The law of a country, the law of the land, the national law (*g*), is in the conflict of laws equivalent to "the law of the forum" in its most comprehensive sense, that is, all the rules of law applied by a court of a given country, or by a court sitting as, or on appeal from, a court of that country (*h*). Furthermore, in accordance with the usage which sanctions "country" in the sense of "law district", the word "foreign" is applied to any other country or its law, even though that country is another province or state of the same federal union or some other part of the same political unit or subject to the same sovereign (*i*).

The law of the forum in this comprehensive sense is divided into two branches, namely, the domestic rules and the conflict rules of the law of the forum.

The first branch consists of those rules of law which are applied by a court normally and as a matter of course in most of the cases coming before it. Usually the situation giving rise

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(*f*) As to a law district that is composite in this sense, see chapter 9, § 3.

(*g*) *E.g.*, 3 Beale, Conflict of Laws (1935) 1968.

(*h*) For example, on an appeal from Scotland heard in England by the House of Lords, the law of the forum is Scottish law; on an appeal from Ontario heard in England by the Privy Council, the law of the forum is Ontario law; and on an appeal from Quebec heard in Ontario by the Supreme Court of Canada, the law of the forum is Quebec law. For further discussion of this matter, with particular reference to the Privy Council, see chapter 10.

(*i*) In other words, questions of the conflict of laws may arise in what may be called "intranational" cases as well as "international" cases. See chapter 11.

to litigation is a purely domestic situation, that is, it is not connected by any significant place element with any other country and there is consequently no occasion to enquire whether any regard should be had to the law of any other country. These rules may, with sufficient accuracy, be called the "domestic" or "local" rules of the law of the forum. They are sometimes called "internal", "municipal" or "territorial" rules, but these adjectives would seem to be ambiguous because they are sometimes used with reference to the whole body of law in force in a given country, as contrasted with, for example, international law. Taintor has suggested the use of the expression "dispositive" rules, but his suggestion has been criticized on the ground that *jus dispositivum* has a different and time-honoured meaning in the civil law (j).

The second branch of the law of the forum consists of those rules of law which are variously called "rules of the conflict of laws"—or more shortly "conflict rules"—or "choice of law rules" or "indicative rules". The expression "choice of law rule" is not uncommon, but both it and "indicative rule" would seem to be less appropriate than "rule of the conflict of laws" or "conflict rule". Either of the former expressions suggests that the function of the rule is simpler than it is, as if the solution of a problem in the conflict of laws consisted merely in the choice or indication of the proper law. On the other hand the latter expressions are so to speak devoid of implications, as the word "conflict" is merely borrowed from the widely accepted general title of the subject (Conflict of Laws), and are susceptible of receiving whatever content is essential to the solution of a problem in the conflict of laws.

Both the domestic rules and the conflict rules are part of the "law of the forum" in the broad sense in which that term has been used above; and this proposition is sometimes expressed in the form that the conflict rules, like the domestic rules, are part of the "internal", "municipal" or "territorial" law of a given country, notwithstanding that these adjectives are sometimes used with reference to what I have called the domestic

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(j) Nussbaum, *Principles of Private International Law* (1943) 69, 161. A dispositive rule in the civil law means a facultative or directory rule as contrasted with an imperative rule. Taintor uses the expression "dispositive rule" in the sense of a domestic rule as contrasted with an indicative rule (that is, a conflict rule): see *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940), 18 Can. Bar Rev. at p. 593, note 24.

(k) As to the meaning of a conflict rule, see chapter 2.

rules. On the other hand, the expression "law of the forum" or *lex fori* is not uncommonly used in the narrow sense of the domestic rules of the law of a country as distinguished from its conflict rules—sometimes without ambiguity if the context shows clearly that it is being used in the narrow sense, and sometimes confusingly if the context does not make the meaning clear.

The domestic rules of the law of the forum of a given country are usually stated in general or absolute terms, without any suggestion or indication that they may not be applicable or appropriate to all situations giving rise to litigation in that country, that is, without any express or implied reference to the existence of conflict rules (*l*). It may happen, however, that these domestic rules are inapplicable or inappropriate to a situation factually connected with some other country or countries, that is, a situation containing a foreign element or foreign elements; and in such a situation the function of the conflict rules of the law of the forum is to define the policy of that law as regards the extent to which justice and social convenience require a court to refer to or consult foreign law and, instead of applying the domestic rules appropriate to a purely local situation, to formulate and apply special rules borrowed from or modelled on rules of foreign law. These special rules so formulated and applied as being appropriate to the actual situation are themselves, by virtue of the conflict rules, part of the law of the forum.

The foregoing is intended to be a mere general description of the function of a conflict rule, so worded as to leave various theories open for later discussion (*m*). I have deliberately omitted the statement that one of the functions of a conflict rule is to define the limits of the applicability of the domestic rules of the law of the forum, because that statement, though plausible, might involve certain consequences that will be more appropriately discussed later (*n*).

The scope of the subject of the conflict of laws as indicated by the description of the function of a conflict rule does not cover the topic of jurisdiction of courts and the related topic of the enforcement of foreign judgments. These topics are, however, customarily and conveniently, discussed in Anglo-American

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(*l*) In Anglo-American countries conflict rules are rarely the subject of statutory enactment.

(*m*) See chapter 2, The Meaning of a Conflict Rule.

(*n*) See the discussion of Westlake's so-called *désistement* theory in § 1 (5) of chapter 2.

books bearing the general title of the Conflict of Laws or Private International Law. Although the former of these titles is not in itself appropriate to these topics, Conflict of Laws is the prevalent general title in the United States and Canada, whereas in England some authors use the one title and others the other title. In continental Europe the title Conflict of Laws is used as a sub-title of part of the subject covered by the general title Private International Law, and there are differences, which it is unnecessary to discuss here, as to the scope of the subject covered by that general title. In French the expression Private International Law is reproduced exactly in *Droit International Privé*—the sequence of the words being in effect the same, when allowance is made for the inversion of the whole expression in accordance with French usage (o). In German, on the contrary, the sequence of the words is transposed in *Internationales Privatrecht* (International Private Law). Westlake (p) defends Private International Law, whereas Holland (q) thinks that it is "wholly indefensible", and considers International Private Law less objectionable, and says: "Of the old names, 'the Conflict of Laws' is probably the best, 'Private International Law' is indubitably the worst".

A conflict rule is sometimes expressed unilaterally, that is, it purports merely to provide in certain circumstances for the extra-territorial application, so to speak, of domestic rules of the law of the forum (as for example, the famous article 3 of the French Civil Code, providing that the laws concerning the status and capacity of persons govern Frenchmen, even if they reside in a foreign country) (r), and only by implication or parity of reasoning suggest resort to foreign law in converse or other circumstances (as, in the example given, if the French Civil Code had also provided that the status and capacity of foreigners should be governed by their national law). More frequently, however, a conflict rule is expressed in general terms, and is sometimes described as being bilateral, because it indicates that

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(o) On this point it would appear that Nussbaum, *Principles of Private International Law* (1943) 7, 8, is in error in his suggestion that the sequence in French differs from the sequence in English and is the same as the sequence in German; cf. my review of Nussbaum (1944), 22 Can. Bar Rev. 274, 44 Columbia L. Rev. 294.

(p) *Private International Law* (5th ed. 1912) 5.

(q) *The Elements of Jurisprudence* (12th ed. 1916) 422, 424.

(r) The Introductory Act of the German Civil Code contains several examples of unilateral conflict rules.

in certain kinds of situations a court should apply the domestic rules of the law of the forum and in others should resort to foreign law. A bilateral conflict rule is usually expressed in the form that a given kind of question is "governed" or "determined" by (or that the forum shall as regards that kind of question "apply"), the "law" of a country which is ascertained by reference to a particular local or place element occurring in the factual situation, as, for example, the country in which the deceased person was domiciled at the time of his death as regards the question of succession to movables on death, the country in which a marriage was celebrated as regards the question of the formal validity of the marriage, and the country in which a thing is, or was at the material time, situated as regards the validity of the transfer *inter vivos* of a tangible thing. If the forum is in X, and Y is ascertained as the country of domicile, place of celebration or situs, as the case may be, then the conflict rule, originally expressed in abstract form, may now be expressed in concrete form, namely, that the question which the court in X has to decide is "governed" or "determined" by the "law" of Y, or that the court in X shall "apply" the "law" of Y.

Owing to the generality and brevity of conflict rules, as conventionally expressed, some of their terms are likely to be ambiguous. Sometimes the particular sense in which a term is used is made clear by the context, as, for example, if a conflict rule refers to the "law of the forum" (s), but it is less likely that the context alone will avoid the ambiguity inherent in the statement that in a particular situation or as regards a particular question a court should "apply" the "law" of a particular foreign country, or that the question is "governed" or "determined" by the "law" of that country. Some of the phases of this ambiguity will be discussed later (t), but it should be noted here that statements of this kind are convenient "short-hand" expressions, and that notwithstanding their inherent ambiguity their use is almost inevitable for the sake of reasonable brevity of language. It is important that their various possible meanings be investigated and that the particular meaning that they are intended by a writer to bear should be made clear by him.

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(s) In this example it is clear that the particular reference is to the law of the forum in the narrow sense of the domestic rules of that law, and not to the law of the forum in the sense of the whole law of the forum, including its conflict rules.

(t) See, e.g., chapter 2, the Meaning of a Conflict Rule.

Nearly forty years ago, in an important article on the Individual Liability of Stockholders and the Conflict of Laws (*u*), Wesley Newcomb Hohfeld (*v*) drew attention to the inherent ambiguity of conflict rules expressed in the conventional general and brief form, and, for example, said (*w*):

From these suggestions it must be evident that in the case under consideration, as in almost all other cases relating to the conflict of laws, there is a serious ambiguity lurking in a judicial statement that a certain foreign law governs a given case.

More than twenty years ago Walter Wheeler Cook wrote the first of his leading articles on the conflict of laws, and in that and subsequent articles he expounded his views on the inherent ambiguity of conflict rules (*x*).

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(*u*) (1909), 9 Columbia L. Rev. 492, (1910), 10 Columbia L. Rev. 283, republished (1923), after Hohfeld's death, at pp. 229, 260 of his *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (edited by Walter Wheeler Cook, with an Introduction by the editor on Hohfeld's Contributions to the Science of Law, reprinted from (1919), 28 Yale L.J. 721).

(*v*) Hohfeld's article cited in note (*u*) is again cited at the end of chapter 18 with particular reference to the distinction between an agent's authority (as between himself and his principal) and his power to bind his principal (as between his principal and third parties). As to Hohfeld, see also note (*u*) at pp. 18, 19, *infra*, and note (*d*), at p. 32, *infra*, with cross reference to chapter 30, § 2.

(*w*) *Fundamental Legal Conceptions*, etc. (see note (*u*), *supra*), at p. 256.

(*x*) See note (*b*) on p. 32, *infra*. Frequent references to Cook's views are made in chapter 2 and later chapters of the present book.

## CHAPTER II.

### THE MEANING OF A CONFLICT RULE

#### § 1. Rights acquired under a foreign law.

- (1) The recognition and enforcement of foreign created rights, p. 9.
- (2) The *obligatio* theory, p. 11.
- (3) *Phillips v. Eyre* and *Machado v. Fontes*, p. 15.
- (4) Status and the law of the domicile, p. 21.
- (5) The *désistement* theory, p. 22.

#### § 2. Rights created by the law of the forum.

- (1) The reception or incorporation of foreign domestic rules, p. 24.
- (2) The nature of a right; the forum applies only its own law, p. 27.
- (3) The local law theory, p. 32.

#### § 1. Rights Acquired under a Foreign Law.

It is to be assumed for the purpose of the following discussion that a court in X has to adjudicate on a case, and that the court has decided that it is referred by a conflict rule of the law of the forum to the law of Y, because Y is the country in which a person is or was domiciled, or in which a thing is or was situated, or in which an act was done, or otherwise according to the particular circumstances and the appropriate conflict rule. The reference to the law of Y is usually expressed in the conventional form that the question in issue is "governed" or "determined" by the "law" of Y, or that the court must "apply" the "law" of Y. The words enclosed within quotation marks will all require further discussion. As suggested at the end of the preceding chapter, there may be an inherent ambiguity in a conflict rule so expressed, and for the purpose of elucidating some of the phases of that ambiguity it is proposed to state and discuss various theories relating to the meaning of a conflict rule.

#### (1) *The Recognition and Enforcement of Foreign Created Rights.*

According to one view, when a court in X is referred by a conflict rule of the law of the forum to the law of Y with regard

to a particular question arising from a given factual situation, the rule indicates that Y is the country which has exclusive "legislative jurisdiction" or "power" to create "rights" in the circumstances, and consequently the task of the court in X is to ascertain what rights have been "created" by the law of Y and to recognize and enforce rights in favour of persons who have "acquired" them under the law of Y. This theory of the recognition and enforcement of foreign created rights is categorically stated and elaborately developed in the writings of Beale (*a*) and in the Conflict of Laws Restatement (*b*). As expressed by Willis (*c*):

The rules of the Restatement are based on the assumption that (*a*) the court of the forum, being a court which exists for the enforcement of legal rights only, can give no help to a party unless he can pull out of his pocket a legal right which he, quite fictitiously of course, is carrying about with him, and that (*b*) that legal right only exists in so far as some system of law created it. It follows from this theory that questions of choice of law are ultimately questions of jurisdiction in disguise; . . .

A similar theory is stated as a "general principle" by Dicey, as follows (*d*):

General Principle No. I.—Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English courts, and no right which has not been duly acquired is enforced or, in general, recognized by English courts.

This principle, Dicey adds, "must, of course, be understood as limited by the exceptions or limitations contained in Principle No. II," which is in part as follows:

General Principle No. II.—English courts will not enforce a right otherwise duly acquired under the law of a foreign country: (*b*) Where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions.

Consistently with these principles the same author (*p. 5*) says that English conflict rules "may be provisionally described as principles of the law of England, governing the extra-territorial operation of law or recognition of rights." He also says (*p. 18*) that English judges "never in strictness enforce the law of any country but their own, and when they are popularly said to enforce a foreign law, what they enforce is not a foreign

(*a*) Culminating in his Treatise on the Conflict of Laws (1935).

(*b*) Promulgated by the American Law Institute (1934).

(*c*) Two Approaches to the Conflict of Laws (1936), 15 Can. Bar. Rev. 1, at *p. 3*.

(*d*) Conflict of Laws (5th ed. 1932) 19, 27.

law, but a right acquired under the law of a foreign country." (e).

It is doubtful whether Dicey, in what purports to be a digest of the law of England with reference to the conflict of laws, applies throughout his book, his own "general principles" or succeeds in expounding English decisions as being based upon those principles. He is consistent with his own principles, however, in his approval of the doctrine of the *renvoi*, whereas Beale and the Conflict of Laws Restatement (§ 7) reject the doctrine of the *renvoi* as a general principle, without any attempt to reconcile the rejection of the *renvoi* with the adoption of the acquired rights theory (f).

As a further basis for the subsequent discussion it seems worthwhile to quote some leading judicial *obiter dicta* in which the theory of acquired rights is expressly or impliedly stated. To what extent these *obiter dicta* or some of the statements of non-judicial writers are to be taken literally or even seriously, or to what extent they may be merely conventional modes of speech, will be discussed later.

### (2) *The Obligatio Theory.*

In the United States the generally prevailing rule is that tort liability is governed by the law of the "place of wrong", that is, the law of the country where the alleged tort was committed. Especially, but not exclusively (g), in this field of law, the acquired rights or foreign created rights theory appears in the form of the *obligatio* theory stated by Holmes J. in *Slater v. Mexican National Railroad Co.* (h). In that case an action was brought in a Texas federal court to recover damages for a death wrongfully caused in Mexico. It appeared that a Mexican court would have awarded to the dependent relatives of the deceased person a series of periodical payments during the probable normal period of his life, terminable upon any one of several contingencies. It was held by the Supreme Court of the United

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(e) Similar futile attempts to distinguish the enforcement of foreign law from the enforcement of rights acquired under a foreign law occur in some of the judicial statements quoted later in the present § 1. The matter is further discussed in § 2 (2) of the present chapter, *infra*.

(f) As to *renvoi* expressed in terms of acquired rights, see § 1 (4) of the present chapter and the cross-references there given.

(g) Cf. *Davis v. Mills* (1904), 194 U.S. 451: see chapter 13, § 3.

(h) (1904), 194 U.S. 120, at p. 126. The theory was restated by Holmes J. in *Western Union Telegraph Co. v. Brown* (1914), 214 U.S. 542, at p. 547.

States that the Texas court had no power to make a similar decree, and that it would not be just to substitute for a decree of that kind a judgment for a lump sum according to the practice of common law courts, and that the action should therefore be dismissed (*i*). For the present purpose, we are concerned only with the following extract from the judgment of Holmes J:

But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously it does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found . . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.

I have quoted the whole passage from the judgment of Holmes J. because it includes the statement of his view that the enforcement of an obligation created by a foreign law does not mean that the foreign law is operative outside of its own territory. Nevertheless, the "underlying conception of the *obligatio* theory is that the claim asserted by the plaintiff is given to him by the foreign law, which has the exclusive power to create the right (*j*)."<sup>2</sup> If we think of the right of the plaintiff, correlative of the defendant's obligation or duty, Holmes J. states a theory which seems to involve the reification of a right as a thing existing objectively and affording a foundation for the plaintiff's action, whereas elsewhere he states a wholly different theory, namely, that a right exists only if it can be predicated that the courts and officials of the country of the forum will enforce it (*k*)

(*i*) Cf. Hancock, *Torts in the Conflict of Laws* (1942) 31, 32, 58, 59, 80. The case is stated by Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 34, and his discussion of Holmes J.'s theory at pp. 35, 36, is supplemented on pp. 116 ff., 133, 311, 350.

(*j*) Lorenzen, *Tort Liability and the Conflict of Laws* (1931), 47 L.Q. Rev. 481, at p. 485. This underlying conception is explicitly stated as a general principle in Beale and the Restatement.

(*k*) In a passage which is quoted and discussed at p. 29, *infra*, Holmes J. states that "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things

In *Loucks v. Standard Oil Co. of New York* (1) Cardozo J. says:

The plaintiff owns something and we help him to get it . . . . We do this unless some sound reason of public policy makes it unwise for us to lend our aid.

In what we may call, with mental reservations, the simple case, in which the act is done and the harm is caused in a single foreign country, so that the situation is a purely domestic one from the point of view of a court of that country, it seems at first sight that a reference to the law of that country by a court in another country is easy to justify and free from difficulty in its application. The simplicity is, however, superficial. The justification for the reference may be found by exponents of the acquired rights theory, entirely to their own satisfaction, and quite logically, on the basis of the exclusive legislative jurisdiction of the foreign country to create rights arising out of the situation, and may be found by others in the social desirability of uniformity of decision in the foreign country and in the country of the forum. On either of these grounds of justification for the reference, the reference must be to all the rules of law of the foreign law so that the case will be decided by the forum in the same way as the very same case would be decided by a court of the foreign country (*m*). This would seem to involve resort to the conflict rules of the foreign law, and presumably its rules of procedure and public policy, otherwise the forum would neither enforce a right created by the foreign law nor achieve uniformity of decision. The best that might be said for the exclusive application of the domestic rules of the foreign law would be that uniformity is achieved in a rough and ready or approximate way, because in most cases there would be no conflict rules or other rules of the foreign law that would lead to a different result.

In a more complex situation where a person acts in one country and causes harm in another, courts and writers sometimes evade the difficulty, without adequate discussion, by say-

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said to contravene it". Effective use is made of these words by Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 30, 36, 170, 354; *cf.* p. 15, quoting an analogous statement of Holmes J. as to the meaning of "law", quoted in its context at p. 28, *infra*.

(1) (1918), 224 N.Y. 99.

(*m*) *Cf.* Cook, *op. cit.* (note (*k*) *supra*) 21. Presumably Hancock, *op. cit.* (note (*i*), *supra*) would not agree with the statement in the text because he, at p. 5, defines the "law of the place of wrong" as the "internal law of the place of wrong".

ing that the applicable law is the law of the country where the harm ensued but in which the actor did not act. The Conflict of Laws Restatement departs, in the case of torts, from the theory that in a given situation there is one country which has "legislative jurisdiction" to create rights which must be recognized elsewhere, because it states that where the act is done in one country and the harm ensues in another country, a third country is at liberty to choose between a right created in the first country or a right created in the second country (*n*). In this more complex case, both within and without the field of tort law, the acquired rights theory requires the elaboration of a set of rules for determining in what circumstances a particular country has legislative jurisdiction to create rights, so that the search for a substantial basis for the reference to the law of a particular country is in effect shifted back from choice of law to legislative jurisdiction (*o*). Even on the basis of uniformity of decision, without regard to the acquired rights theory, it is not always easy to follow the reasoning by which the forum is to choose this or that foreign country as the one in accordance with which the decisions of the forum are to be uniform.

One of the major services rendered by Cook to the study of the conflict of laws consists in his devastating criticism of the Beale-Restatement theory of the enforcement of foreign-created rights in general, and of the specific provisions of the Restatement with regard to torts, contracts, substance and procedure (*p*). Cook's series of leading articles on the conflict of laws began with an article published in 1924 (*q*). Almost at the same time there also appeared a leading article by Lorenzen (*r*), criticising the acquired rights or foreign created rights theory. Even de Sloovere, in his moderate defence of the theory

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(*n*) Restatement, § 64, § 65 and comment *b*, § 377 and comment *a*; cf. Cook, *op. cit.* (note (*k*), *supra*) 319, 345.

(*o*) Cf. Stumberg, Conflict of Laws (1937) 7 ff.

(*p*) Cook, *op. cit.* (note (*k*), *supra*), chapters 1, 2, 3, 6, 13, 14, *passim*, and the subsequent discussion in § 2 of the present chapter.

(*q*) The Logical and Legal Bases of the Conflict of Laws (1924), 33 Yale L.J. 457, republished as chapter 1 in his book bearing the same title with "supplementary remarks, 1942".

(*r*) Territoriality, Public Policy, and the Conflict of Laws (1924), 33 Yale L.J. 736; cf. his Tort Liability and the Conflict of Laws (1931), 47 L.Q. Rev. 481. See also Yntema, The Hornbook Method and the Conflict of Laws (1926), 37 Yale L.J. 467, at pp. 473 ff.; Cheatham, American Theories of the Conflict of Laws; Their Role and Utility (1945), 58 Harv. L. Rev. 361, at pp. 379 ff.

as being a conventional mode of statement of conflict rules, states a formidable series of objections to the theory (s).

(3) *Phillips v. Eyres and Machado v. Fontes.*

The leading case with regard to an action brought in England for a tort alleged to have been committed elsewhere is of course *Phillips v. Eyre* (a). The action was for assault and false imprisonment of the plaintiff in Jamaica, and the defendant pleaded a subsequent act of indemnity passed by the legislature of Jamaica. As to one of the plaintiff's grounds of objection to the plea of the statute, Willes J., delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, said, in part (b):

The last objection to the plea of the colonial Act was of a more technical character; that assuming the colonial Act to be valid in Jamaica and a defence there, it could not have the extra-territorial effect of taking away the right of action in an English court. This objection is founded on a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. *Quae accessorium locum obtinent extinguuntur cum principales res peremptae sunt.* A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject-matter may show that the parties intended their bargain to be governed by some other law; but, *prima facie*, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.

Willes J.'s theory that the right of action is accessory to the obligation and stands or falls with it, and is equally "the creature of the law of the place and subordinate thereto," bears an obvious resemblance to the theory of Holmes J. that the source of an obligation in tort is the law of the place of the act, that its existence and extent are determined by that law, and that it "follows the person, and may be enforced wherever the person may be found." Each theory involves the reification of an obligation or duty, or correlatively of a right, supposedly supporting a right of action, whereas the right and correlative

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(s) On Looking into Mr. Beale's Conflict of Laws (1936), 13 N.Y.U.L.Q. Rev. 333, amplifying his earlier article on the Local Law Theory and its Implications in the Conflict of Laws (1928), 41 Harv. L. Rev. 421.

(a) (1870), L.R. 6 Q.B. 1.

(b) L.R. 6 Q.B. at p. 28.

obligation or duty exist because it can be predicted that there will be a cause of action (c).

The only conclusion that Willes J. drew from the theory stated by him was a negative one, namely:

Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

Willes J. did not suggest that "therefore" an act committed abroad, if it was an actionable wrong by the "law of the place," would or should be actionable in England (d). On the contrary, dealing with these two propositions in the reverse order, he stated, in language which has been so often quoted:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

The first of these two conditions was fulfilled in the circumstances of the case and did not call for discussion, because assault and false imprisonment were actionable wrongs by the domestic rules of the laws of both England and Jamaica, and Willes J. contented himself with the citation of the single case of *The Halley* (e).

The second condition was in effect a repetition of the statement of principle contained in the second passage quoted above from the judgment, "justifiable" being substituted for "valid and unquestionable." The decision turned upon the question whether this condition was fulfilled, and therefore Willes J. discussed the principle with some particularity, citing various cases, beginning with those in which an act done abroad was originally justifiable under the foreign law, and ending with those in which an obligation was incurred abroad and was subsequently discharged under the foreign law. His conclusion was that the

(c) See note (k), *supra*.

(d) As Hancock, *Torts in the Conflict of Laws* (1942) 57, suggests "the recognition of foreign defences is more pressing and important than the recognition of foreign claims".

(e) (1867), L.R. 2 P.C. 193. The *Halley* case and its interpretation by Willes J. have been the subject of criticism. See e.g., Robertson, *The Choice of Law for Tort Liability in the Conflict of Laws* (1940), 4 *Modern L. Rev.* 27; Hancock, *op. cit.*, pp. 12 ff., 89, 269 ff.

Jamaican act of indemnity afforded a defence to an action in England (*f*).

It is outside of the scope of the present chapter to discuss the merits or demerits of the formula stated in *Phillips v. Eyre*, embodying the two conditions to be fulfilled as a prerequisite to the bringing of an action in England for a wrong alleged to have been committed abroad. The formula has been applied by the Privy Council to the case of an action brought in one common law province of Canada for a tort alleged to have been committed in another common law province (*g*); and has even been held by the Supreme Court of Canada to be part of the system of the conflict of laws of the province of Quebec (*h*). The formula appears therefore to be unquestionable as a matter of authority in the conflict of laws of England and the provinces of Canada. Some observations on its wording and effect are, however, relevant to the present discussion of the meaning of a conflict rule.

The formula states two conflict rules of the law of the forum, referring respectively to the law of the forum and to the law of the place where the act was done. The first reference must obviously be construed as a reference to the domestic rules of the law of the forum, as a reference by a conflict rule of the law of the forum to the conflict rules of the law of the forum would be meaningless. Specifically, under the first condition it must be supposed that the act, in fact done abroad, has been done in the country of the forum, so that the situation becomes hypothetically a purely domestic situation to which the domestic rules of the law of the forum are applicable (*i*). The reference under the second condition to the law of the place where the act was done is of course not necessarily construed as a reference only to the domestic rules of the foreign law, and might be construed as a reference to the whole foreign law in the sense that the

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(*f*) With respect, I am unable to agree with the analysis of the judgment stated in Hancock, *op. cit.*, pp. 8-12, and the author's conclusion that the case was not decided on the "justification principle". His subsequent discussion, at pp. 86 ff., of the "first rule in *Phillips v. Eyre*" differs somewhat from my own discussion, *infra*.

(*g*) *Walpole v. Canadian Northern Ry. Co.*, [1923] A.C. 113, 70 D.L.R. 201, [1922] 3 W.W.R. 900; *McMillan v. Canadian Northern Ry. Co.*, [1923] A.C. 120, 70 D.L.R. 229, [1922] 3 W.W.R. 904.

(*h*) *Canadian National Steamships Co. v. Watson*, [1939] S.C.R. 11, [1939] 1 D.L.R. 273, discussed in chapters 43 and 44. See also *McLean v. Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65, discussed in chapter 45.

(*i*) The point is discussed with reference to cases, in chapter 44.

question whether the act was justifiable or unjustifiable by the foreign law should be decided as it would be decided by a court of the foreign country if the actual case arose for decision there. Any support that the latter construction of the reference to the foreign law under the second condition might be supposed to give the acquired rights or *obligatio* theory is, however, rendered nugatory by the limited and negative terms of the second condition, operating as it does only as a proviso to the first condition, under which the actionability of the act, including the measure of damages, is governed by the domestic rules of the law of the forum (*j*).

This view of the meaning of the English conflict rules with regard to tort liability does not depend on the decision in *Machado v. Fontes* (*k*), but is consistent with that decision, in so far as the Court of Appeal in England held that the defendant was obliged to pay damages in England for an act done in Brazil, which, if it had been done in England, would have constituted the tort of libel, notwithstanding that by the law of Brazil it might be the subject of criminal proceedings, but, as alleged by the defendants and assumed for the purpose of the judgment, could not be the subject of civil proceedings or be the basis of an action for damages.

Opinions may reasonably differ on the question whether the formula stated in *Phillips v. Eyre* embodies rules which are socially desirable. Generally speaking, the formula may be considered to be too severe on the plaintiff as compared with the rule prevailing in the United States and in various other countries, whereas *Machado v. Fontes*, in applying the same formula, goes far in the other direction (*l*). The conclusion reached in *Machado v. Fontes* "is entirely defensible from the standpoint of the fundamental theory of the conflict of laws" (*m*), in that the English court enforced a right created by English law in accordance with the policy of the law of the forum, and did not consider that the question to be decided by it was whether a right had been created by the law of Brazil (*n*).

(*j*) See chapter 45.

(*k*) [1897] 2 Q.B. 231.

(*l*) Cf. Lorenzen, *Tort Liability and the Conflict of Laws* (1931), 47 L.Q. Rev. 481, at pp. 500, 501.

(*m*) Lorenzen, *op. cit.*, at p. 487. For references to observations by various writers, some criticizing, others approving, *Machado v. Fontes*, see chapter 45.

(*n*) Cf. Lorenzen, *op. cit.*, at pp. 484-487. As to the nature of a right, see note (*k*) at pp. 12, 13, *supra*, and the further discussion at

Although some expressions occurring in the judgments in *Machado v. Fontes* suggest that the court considered that it was applying procedural rules of English law, it would appear that the decision does not involve the characterization of damages in tort as a matter of procedure. The court specifically applied the *Phillips v. Eyre* formula, and the reference by the first condition in that formula to the domestic law of England is not in terms limited to the procedural rules of that law, and there seems to be no reason why the reference should not be regarded as including the right to damages and the measure of damages as part of the substantive rules of the domestic law of the forum. In other words, the existence and extent of the obligation are governed by the domestic rules of the law of the forum, and it is therefore immaterial whether the measure of damages is characterized as a matter of procedure, or, as I think it should be, as a matter of the substance of the obligation; and consequently *Machado v. Fontes* is simply an example of the application of the two conditions. *Machado v. Fontes* was in effect approved by the Supreme Court of Canada in *McLean v. Pettigrew* (o), in circumstances that will be discussed in a subsequent chapter.

In the passages quoted above from the judgment of Willes J. in *Phillips v. Eyre* the theory that an obligation in tort is the "creature of the law of the place," that is, the law of the place of the doing of the act which is alleged to be a tort, is expressed also as being applicable to a contractual obligation, the "law of the place" being the law of the place of the making of an alleged contract. In either case the actual application of the theory suggested by Willes J. is merely negative, that is, that an act which is justifiable by the law of the foreign country, either originally or by virtue of subsequent discharge or legitimation under that law, cannot be the ground of action in England.

This theory of acquired rights as applied to contracts is worn exceedingly thin in practice. Beale and the Restatement do, it is true, expound a rigid theory of contractual obligations

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pp. 27 ff.; *infra*. In a review of Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942), Lorenzen (1943), 52 Yale L.J. 680, informs us that Hohfeld, in his course on the conflict of laws at Yale Law School, used *Machado v. Fontes* as the cornerstone upon which his new "local law theory" of the conflict of laws was built. As to the local law theory, see the discussion at p. 32, *infra*.

(o) [1945] S.C.R. 62, [1945] 2 D.L.R. 65, and my comment at pp. 82 ff. of the latter report. See chapter 45.

created by the law of the place of contracting, but they do not logically apply their own theory, because they say that if a court is referred to the law of the place of contracting (the law of another country) the reference is limited to the domestic rules of that law. Obviously the theory requires that the reference should be to the whole of that law for the purpose of ascertaining whether or not a contract was made by that law in the actual situation which is before the court, regard being had to the conflict rules of that law, including its rules as to what is the place of contracting and as to what is the proper law of the contract (*p*). The whole theory of acquired rights is much disputed in the United States, and even the theory that the governing law is the law of the place of contracting is far from being generally accepted (*q*). Also, the theory of acquired rights stated by Willes J. is peculiarly inappropriate in English law to contracts, because by that law the proper law of a contract is not ascertained with exclusive reference to the place of contracting, and, to some extent at least, may be selected by the parties without regard to the place of contracting, and because, in whatever way the proper law is ascertained, courts are accustomed to resort to the domestic rules of the proper law without regard to the conflict rules of that law (*r*) and without regard to what the view of the proper law, selected by the forum, is as to the selection of the proper law.

It is true that Duff J. (afterwards Duff C.J.C.) in *Livesley v. E. Clemens Horst Co.* (*s*) expresses himself in terms of acquired rights, but this manner of speaking has no bearing on the actual decision, namely, that the measure of damages is part of the substance of the contractual obligation, and consequently is governed by the domestic rules of the proper law and not by the domestic rules of the law of the forum. The action was brought in British Columbia upon a contract of sale of goods made in California between persons there resident and to be there performed, so that clearly according to the conflict rules of the laws of British Columbia and California alike the proper law of the contract was the law of California.

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(*p*) Cf. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 370-375.

(*q*) As to the proper law of a contract, see chapter 14, § 5(a).

(*r*) The statement in the text is perhaps inconsistent with the somewhat mystifying *obiter dictum* of Lord Wright, discussed in chapter 16, § 2.

(*s*) [1924] S.C.R. 605, [1925] 1 D.L.R. 159.

(4) *Status and the Law of the Domicile.*

Although the discussion of *In re Askew* (a) is reserved for a subsequent chapter (b), the case deserves mention here because the judgment is an outstanding example of judicial reasoning expressed in terms of acquired rights. The question being whether Margarete Askew had been legitimated by the subsequent marriage of her parents under the law of her father's domicile (the law of Germany), Lord Maugham (Maugham J. as he then was) stated that the task of the English court was to ascertain what rights had been acquired under the law of the domicile, and to give effect to such rights, and in his view the recognition of such rights was something quite different from the English court's applying German law (c). In the learned judge's opinion this mode of stating his reasons for judgment in favour of Margarete Askew's legitimation avoided all the difficulties inherent in earlier judicial treatment of the doctrine of the *renvoi* in cases relating to succession to movables (d).

Of the various modes of stating the doctrine of the *renvoi* it is submitted that the acquired rights mode is the least defensible, but the conclusion reached in the *Askew* case would seem to be right, namely, that a question of the existence of a given status, as distinguished from capacity or as distinguished from the incidents or consequences of status (e), should be decided in the same way as a court of the domicile would decide it (f). On the other hand, there may be more difficulties, both theoretical and practical, in a court's attempt to decide a case of succession to movables in the same way as a court of the domicile would decide it. In any event, it is clear that a decision, hypothetical or actual, of a court of the domicile with respect to movables situated in the country of the domicile can-

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(a) [1930] 2 Ch. 259.

(b) See chapter 7, § 7(3).

(c) As to the invalidity of this distinction, see § 2(2) of the present chapter, *infra*.

(d) See e.g., *In re Annesley*, [1926] Ch. 692, discussed in chapter 7, § 6(4)(d); *In re Ross*, [1930] 1 Ch. 377, discussed in chapter 7, § 6(5)(b). The later case of *In re O'Keefe*, [1940] Ch. 124, is discussed in chapter 9. Various modes of stating the doctrine of the *renvoi* are discussed in chapters 8, § 5, including in § 5(3) the acquired rights theory.

(e) See chapter 4, § 8.

(f) See chapter 7, § 7(2).

not properly be regarded as creating rights to movables situated in another country (*g*).

(5) *The Désistement Theory.*

Although Westlake does not state any general theory of rights acquired in one country which should be recognized and enforced in another country, he does state a special theory which is in effect a theory of legislative jurisdiction and which deserves to be mentioned in connection with the foregoing discussion. His theory, which is commonly known as the *désistement* theory, but which might be better called the disclaimer of jurisdiction theory, was stated by him in a memorandum submitted in 1900 to the Institute of International Law (*h*), which is reproduced, in substance, by Lorenzen (*i*), and was again stated by Westlake in different language in chapter 2 of his Private International Law (*j*).

Expressed briefly, Westlake's theory is that it is the function, or one of the functions, of a conflict rule of the law of the forum to define the limits of the applicability of the domestic rules of the law of the forum (*k*), so that if the law of Y says (1) that capacity to make a will is acquired at the age of 19, and (2) that testamentary capacity is governed by the testator's national law, the result of reading the domestic rule (1) with the conflict rule (2) is that the law of Y has no provision with regard to a testator who is not a national of Y, and the law of Y disclaims jurisdiction with regard to the testamentary capacity of a person who is a national of any other country. Consequently, if the law of X says (1) that testamentary capacity is acquired at the age of 21, and (2) that testamentary capacity is governed by the law of the testator's domicile, and if a court in X has to adjudicate on the capacity of a testator who was a national of X, but domiciled in Y, the court, on resorting to the law of Y must conclude that the law of Y is inapplicable to the case of the particular testator, and as the law of Y disclaims jurisdiction (or, in French, *se désiste*), the

(*g*) See chapter 8, § 5; cf. Cook, Logical and Legal Bases of the Conflict of Laws (1942) 240.

(*h*) 18 *Annuaire de l'Institut de Droit International* (1900) 35-40.

(*i*) The *Renvoi* Doctrine in the Conflict of Laws — Meaning of "The Law of a Country" (1918), 27 *Yale L.J.* 509, at pp. 513, 514.

(*j*) 5th ed. 1912, at pp. 32-34.

(*k*) Deliberately omitted in chapter 1 from my definition or description of the function of a conflict rule.

court in X should apply the domestic rule of the law of X, namely, that testamentary capacity is acquired at the age of 21.

This theory of Westlake, which was a modification of a theory propounded by von Bar, has been critically examined and refuted (*l*), and its discussion here is limited to some observations on its relation to the theory of acquired rights and Westlake's position with regard to that theory and the doctrine of the *renvoi*. Westlake's theory relates only to what may be called a negative aspect of the theory of legislative jurisdiction underlying the acquired rights theory, namely, that resort to a foreign law is unjustified if the foreign law disclaims jurisdiction, and he does not affirmatively advocate the recognition of a right acquired under the law of a foreign country if that country has legislative jurisdiction.

Westlake terminates his chapter 2 as follows:

Thus the *renvoi* is adopted by the English cases when the international domicile fails as a ground of decision, either because (1) nationality and not domicile is adopted as the criterion in the foreign law in question—Baden in *In re Johnson* (*m*)—or (2) the international domicile has not been accompanied by a legal sanction necessary in that country—France in *In re Bowes* (*n*).

I conclude with the opinion, as founded in reason, that a rule referring to a foreign law should be understood as referring to the whole of that law, *necessarily including the limits which it sets to its own application, without a regard to which it would not be really that law which was applied* (*o*). It is also the only opinion accepted in the English judgments, and is at least strongly supported on the continent.

The italicized words indicate the special sense in which Westlake approved of the doctrine of the *renvoi*. The "English judgments" reported before his death (1912) include a number of cases in which an English court recognized the *formal* validity of a will made abroad in accordance with the conflict rules of a foreign country (*p*) and the two discredited cases, cited by him, of *In re Johnson* and *In re Bowes*, the latter of

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(*l*) See Lorenzen, *op. cit.*, pp. 512-518; Schreiber, The Doctrine of the Renvoi in Anglo-American Law (1918), 31 Harv. L. Rev. 523, at pp. 529 ff. Westlake's theory is elaborately discussed by Grassetti, La Dottrina del Rinvio in Diritto Internazionale Privato et la "Common Law" Anglo-Americana (1934), 26 Rivista di Diritto Internazionale, N. 1-2-3.

(*m*) [1903] 1 Ch. 821, as to which see chapter 7, § 6(4) (b) (d), and chapter 9, § 4.

(*n*) (1906) 22 Times L.R. 711, as to which see *In re Annesley*, [1926] Ch. 692, in chapter 7, § 6(4)(d).

(*o*) Italics mine.

(*p*) As to the special treatment of cases with regard to the formalities of a will of movables, see chapter 9, § 5.

which seemed to sanction the *désistement* theory, while in the former the court resorted, not to the law of the forum, but to the law of the domicile of origin.

Westlake's theory is of course inconsistent with the doctrine of *Weiterverweisung* or reference forward to the law of a third country by the law of the country referred to by a conflict rule of the forum (*q*), and he cites *In re Trufort* (*r*) merely as an example of a judgment of a court of the foreign country as an authoritative statement of the foreign law.

Westlake's *désistement* theory is also inconsistent with the various theories of the *renvoi* elaborated in English cases decided since his death (*s*), and it is unnecessary to speculate on what he would have said about these cases.

## § 2. Rights Created by the Law of the Forum

Notwithstanding the formidable series of statements quoted or cited in § 1 in support of the theory of acquired rights or foreign created rights, various considerations (some already mentioned and others to be now discussed) cast doubt on the validity of that theory and seem to suggest that some other explanation of the meaning and effect of a conflict rule must be looked for.

### (1) *The Reception or Incorporation of Foreign Domestic Rules.*

As has been pointed out in § 1, judges and other writers have not infrequently expressed conflict rules in terms of the enforcement of rights acquired or obligations imposed under a foreign law. Sometimes they have used language of this kind because it seemed to afford a theoretical basis for reaching the desirable result of securing uniformity of decision between the foreign country and the country of the forum, or of making the rights and obligations of the parties independent of the plaintiff's choice of a particular forum. Consistently to a certain extent with a theory of the enforcement of foreign acquired rights, courts have, in some exceptional classes of cases, adopted the doctrine of the *renvoi* in one form or an-

(*q*) Westlake stated this in his memorandum submitted to the International Law Institute; see Lorenzen, *op. cit.*, pp. 513, 514.

(*r*) (1887), 36 Ch. D. 600, discussed in chapter 7, § 6(4)(a).

(*s*) Discussed in chapters 7, 8 and 9.

other. Even in these cases they have fallen short of securing complete uniformity of decision; sometimes they have failed really to ascertain how the particular case would be decided if it arose in the foreign country, having regard to whatever rules of law would be applicable there in accordance with the conflict rules of the foreign law; and usually they have failed to observe that in order to ascertain how the particular case would be decided in the foreign country regard must also be had to the rules of procedure and the rules of public policy of the foreign law (a).

On the other hand, in the majority of cases, courts have not seriously attempted to apply in practice the theory of acquired rights to which they have sometimes paid lip service (b). As a general rule, and probably without being fully conscious of the logic involved, Anglo-American courts have refused to adopt, or have ignored, the *renvoi* doctrine (implicit in the acquired rights theory), and, more often than not, have contented themselves with ascertaining the domestic rules of the foreign law, that is, the rules which would be applied by a court of the foreign country (to the law of which the forum is referred by its own conflict rules) to a hypothetical situation similar to that which is under consideration by the forum, but differing from it in that the situation is a purely domestic one from the point of view of the foreign court. Consequently the forum does not enquire how the foreign court would decide the specific case which is before the forum and does not know whether there is any foreign created right to be enforced. "The forum thus enforces not a foreign right but a right created by its own law." (c)

Outside of a limited field in which a reference by an English conflict rule to the law of a foreign domicile has been construed as including the conflict rules of the foreign law, English courts have generally, and almost as a matter of course, construed a reference to foreign law as a reference to the domestic rules of that law, as, for example, a reference to a foreign law as being the proper law of a contract (d).

(a) The doctrine of the *renvoi* is discussed in chapters 7, 8 and 9.

(b) Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 41, 42.

(c) Cook, *op. cit.*, (note (b), *supra*) 20, 21. As to the words enclosed within quotation marks, see especially § 2(2), of the present chapter, *infra*, and as to Cook's own "local law theory", see also § 2 (3), *infra*.

(d) See especially chapter 16, §§ 2 and 3.

In the United States, the courts have usually construed a reference to the law of the place of contracting or to the law of the place of wrong as a reference to the domestic rules of that law, apparently without considering that the consequence may well be that uniformity of decision between the actual forum and the hypothetical forum of the country of the place of contracting or of the place of wrong may be frustrated.

If this usual practice of courts were translated into theoretical form, the result would be what might be called a theory of reception or incorporation of foreign domestic rules. Such a theory of the meaning of a conflict rule, while it is more in accordance with what courts generally do, as contrasted with what they say, than the acquired rights theory or the *obligatio* theory, is itself open to objection if it is put forward as a rigid theory. In some classes of cases, at least, it is important that a court, on being referred by a conflict rule to the law of a foreign country, should make a serious effort to decide the case as it would be decided in the foreign country, that is, should attempt by some form of *renvoi* or otherwise to secure uniformity of decision (e).

What would seem to be required, therefore, is a refinement or more exact statement of various conflict rules, so as to define exactly the meaning of the word "law" in every specific conflict rule stating that the law of a particular country governs or determines the question or that a court is to apply the law of a particular country (f). Alternatively, it may be said that what is required is something more flexible or discretionary than either the acquired rights theory, or *obligatio* theory, or other analogous theory, on the one hand, or the theory of the reception or incorporation of foreign domestic rules, on the other hand. In other words, the word "law" in the reference by a conflict rule to the law of a foreign country may have one meaning with regard to one kind of question and another meaning with regard to another kind of question (g).

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(e) See chapter 8, § 6, and chapter 9, § 5.

(f) Cf. Cook, *op. cit.*, (note (b), *supra*) 239: "What is here suggested is that the problems need to be broken down into smaller units and discussed in each case in terms of the social and economic situations involved".

(g) See the further discussion in § 2(2) (3) of the present chapter, *infra*.

(2) *The Nature of a Right; the Forum Applies Only Its Own Law.*

The question of the meaning of a conflict rule may now be considered from some other points of view, with special reference to the word "apply" in, for example, a conflict rule expressed in the conventional form that a court in X should apply the law of Y, and to the word "right" in, for example, a statement that a court in X should recognize and enforce a right acquired under the law of Y.

If a question arising from facts occurring wholly in Y, or from a factual situation significantly connected only with Y, has to be decided by a court in X, the court may sometimes seem to "apply" the domestic rules of the law of Y, but, strictly speaking, neither the domestic rules of the law of X nor those of the law of Y are, as such, "applicable" to the actual situation (a). The illusion that the court in X "applies" the law of Y in any sense, or that it decides the case in the same way as a court in Y would decide the case or that it recognizes or enforces a "right" created by the law of Y, disappears when it is considered that if the same case presented itself to a court in Y for decision, the court in Y would apply the domestic rules of the law of Y, including its rules of public policy and its procedural rules, without regard to the court's characterization of any of these rules as being substantive or procedural (b), or as the case may be, and that there are no domestic rules of the law of Y that are applicable, as such, to litigation in X; whereas a court in X may have to pick and choose among the domestic rules of the law of Y, disregarding those which for the purposes of the conflict rules of the law of X are characterized as procedural. Plainly the law of Y contains no conflict rule that is applicable to the actual situation.

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(a) As to the following discussion in the text of the question of the "application" of foreign law, see especially Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 219 ff. (chapter on Characterization) and 338 ff. (chapter on Tort Liability). So far as Cook's discussion relates specifically to torts, it is not wholly appropriate to the treatment of tort liability in English conflict of laws (see chapter 2, § 1(3), and chapter 45), but most of his discussion is susceptible of generalization and is appropriate also to other topics. See also his discussion, at pp. 347 ff. of the 'Validity' of 'Contracts'; the 'Place of Contracting' Theory.

(b) As to this question of characterization, see the discussion of statutes of limitation in chapter 13, § 3, and of the Statute of Frauds in chapter 4, § 4.

If the question to be decided by a court in X arises from facts occurring partly in X and partly in Y or elsewhere, it would appear that neither the domestic rules of the law of X nor those of the law of Y are, as such, applicable, and there is not even the illusion that the court in X "applies" the law of Y or recognizes or enforces a "right" created by the law of Y (c). The conflict rules of the law of Y are not, as such, applicable to litigation in X, and the extent to which a court in X should resort to such rules depends on the policy of the conflict rules of the law of X. It should be borne in mind, however, that if the facts of a situation occur partly in X and partly in Y or elsewhere, the problem presenting itself to a court in X is not necessarily difficult. As regards a particular question it may appear that according to the relevant conflict rule of the law of the forum the localization of only one of the facts is significant, and that it is immaterial that all the facts have not occurred in the same country (d).

As has been pointed out earlier in the present chapter, attempts have sometimes been made to distinguish between the application or enforcement of foreign law and the recognition and enforcement of a right created by a foreign law or acquired under a foreign law. The distinction is, it is submitted, fallacious, and the next part of the present discussion involves the consideration of the nature of a "right" and of the meaning of "law." Holmes J.'s statement of the so-called *obligatio* theory is so frequently quoted that it seems appropriate now to quote the following passages from his extra-judicial writing:

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted maxims or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. *The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law* (e).

(c) As Cook, *op. cit.*, (note (a), *supra*) 314, points out, advocates of the acquired rights theory dismiss with little or no discussion the difficulties encountered in this more complex situation.

(d) See chapter 4, *passim*.

(e) Holmes, *The Path of the Law* (1897), 10 Harv. L. Rev. 457, at pp. 460, 461, reprinted in his *Collected Legal Papers* (1920) 173, quoted in part in Cook, *op. cit.*, (note (a), *supra*) 15. The italics are mine. At p. 354 Cook quotes from Cardozo, *The Growth of the Law*

I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights. *But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it*—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it. No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a pre-existing right. A dog will fight for his bone (*f*).

Cook, in various places in his book (*g*), makes ample use of the theory stated in the foregoing quotations, and I merely add here some observations in my own words. If a right is merely the hypostatization or reification of a prediction that the courts and officials of a given country will afford a remedy, it follows that in a given situation a person may have a right in one country and no right or a different right in another country and that there can be no question of a court in one country enforcing a person's right merely because he has a right in another country. If, on the other hand, we think of a right as having an objective existence and say that because a person has a right he is entitled to a remedy, we invert cause and effect. We have by a natural imaginary process reified or "thingified" the right and thus made it possible to treat the right as something which a person can acquire in one country and carry with him and enforce in another country, or in correlative terms to treat a duty or obligation as something which is imposed on a person in one country and which follows him to another country.

Learned Hand J. has on various occasions stated a theory strikingly different from Holmes J.'s *obligatio* theory. In *Scheer v. Rockne Motors Corporation* (*h*) he says:

(1924) 33: "when there is such a degree of probability as to lead to a reasonable assurance that a given conclusion ought to be and will be embodied in a judgment, we speak of the conclusion as law."

(*f*) Holmes, *Natural Law* (1918), 32 Harv. L. Rev. 40, at p. 42, reprinted in his *Collected Legal Papers* (1920) 313, quoted in part in Cook, *op. cit.*, (note (*a*), *supra*) 30, 36, 170, 354. The italics are mine.

(*g*) *Op. cit.*, (note (*a*), *supra*), especially at pp. 29 ff. For other references, see notes (*e*) and (*f*), *supra*.

(*h*) (1934), 68 Fed. (2d) 942, at p. 944.

We must remember that the question is never of enforcing a liability arising in another state; no court can do that but one of the state where it arose; . . . The sole question, here as always, is how far the court of the forum will adopt the law of another place as the standard for its own legal consequences.

In other cases he emphasizes the proposition that no court can enforce any law but the law of its own sovereign or any rights or duties other than those created by that law, though it may impose "an obligation of its own as nearly homologous as possible to that arising" under a foreign law (*i*), or recognize "obligations created elsewhere" as "the original of the copies which they themselves enforce" (*j*), or impute to suitors "rights and duties similar to those which arose in the place where the relevant facts occurred" (*k*).

Lorenzen says (*l*):

If one looks at legal rights in a realistic way, that is to say, from the standpoint of the actual power and behaviour of courts or other governmental agencies entrusted with the enforcement of legal rights, the view advanced by Judge Learned Hand would appear to be more accurate than the *obligatio* theory of Mr. Justice Holmes. It is true courts talk a good deal about the enforcement of "foreign" rights, but this may be nothing more than a convenient way of talking.

As stated by Cook (*m*):

The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in many groups of cases, and subject to the exceptions to be noted later, the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element*. The rule thus 'incorporated' into the law of the forum may for convenience be called the 'domestic rule' of the foreign state, as distinguished from its rule applicable to cases involving foreign elements. The forum thus enforces not a foreign right but a right created by its own law.

(*i*) *Guinness v. Miller* (1923), 291 Fed. 769, at p. 770.

(*j*) *The James McGee* (1924), 300 Fed. 93, at p. 96.

(*k*) *Direction der Disconto-Gesellschaft v. U. S. Steel Corporation* (1924), 300 Fed. 741, at p. 744.

(*l*) *Tort Liability and the Conflict of Laws* (1931), 47 L.Q. Rev. 481, at p. 487.

(*m*) *Logical and Legal Bases of the Conflict of Laws* (1942) 20, 21. In a footnote appended to the foregoing passage the author adds: "The use of the word 'incorporated' here has led at least one critic to ascribe to the present writer the theory that the foreign 'law' is in some mysterious way actually 'incorporated' as 'law' into the legal system of the forum. Clearly all that is meant is that the forum models its own applicable rule of law upon the foreign rule of law."

The same author continues (*n*):

The exceptions to the foregoing statement seem to fall into two classes. The first includes those cases in which the facts involved are all, from the point of view of the foreign state, purely domestic facts. Here the rule of decision adopted into its law by the forum is normally identical in scope with, or at least highly similar to, the rule of decision which the foreign state would apply to the very case before the forum. . . . The second class includes cases in which on grounds of practical expediency the forum decides to apply as its rule of decision the rule which the foreign court would have applied, not to a (for it) purely domestic case, but to this very case if it had been brought there. Obviously the rule so selected is the one indicated by the rules of the conflict of laws in the foreign state. . . . Note, however, that even in these exceptional cases, it is not the foreign 'law' or 'right' that is enforced, but that the law of the forum adopts as its law a rule of decision reaching the same, or at least a highly similar result to that reached by the foreign law.

The question raised by Cook's "second class" of "exceptions" is whether in some kinds of cases or as regards some kinds of questions the adoption of the doctrine of the *renvoi* is desirable or justifiable. This question is discussed in subsequent chapters of the present book (*o*).

As to the "first class" of "exceptions", Cook's statement raises an entirely different question. The case being *ex hypothesi* a purely domestic case in the foreign country and one to which a court of that country would have no occasion to apply its conflict rules, the foreign court would of course apply the domestic rules of the law of the forum, including its rules of procedure and even its rules of public policy; and the suggestion is that a court in another country, if the case should require adjudication there, should decide the case in the same way as a court of the foreign country would decide the very same case. No question of the *renvoi* would be raised, but even if we suppose that the learned author did not intend to say that the foreign rules of public policy should be followed, he must have meant at least that the foreign rules of procedure should be followed, so far as they might be decisive in allowing or refusing a right of action. In that event it is probable that his statement should be limited in its application to cases in which a court might, for the purpose of its own conflict rules, characterize a foreign rule as substantive, even though in the foreign law it is characterized as procedural (*p*).

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(*n*) *Op. cit.*, (note (*m*), *supra*) 21, 22.

(*o*) See especially chapter 8, § 6, and chapter 9, § 5.

(*p*) *Cf.* chapter 13 (Substance and Procedure) and chapter 11, § 2 (with particular reference to a suggestion made by Cook, *op. cit.*, p. 223).

(3) *The Local Law Theory.*

The term "local law theory" (a) has come into use as a description of a mode of approach to problems of the conflict of laws, advocated especially by Cook (b). Some of the leading features of this approach have been indicated in the foregoing sections of this chapter, including the rejection of the acquired rights or foreign created rights theory, and the adoption of the view that a court applies only the law of the forum, although in particular circumstances it should resort to or consult foreign law and model or formulate rules of the law of the forum upon foreign rules of law, to an extent that is dictated by considerations of social convenience or practical expediency.

Cook was not the first of Anglo-American writers to advocate an approach to problems of the conflict of laws which might be described by the term "local law theory." Lorenzen, in a review of Cook's book (c), uses the same term with reference to Hohfeld's earlier course on the conflict of laws at the Yale Law School (d), and continues as follows:

Unfortunately for legal scholarship, Hohfeld had only started his work of developing a new legal analysis in the field of the conflict of laws when his untimely death took him from our midst, making Cook his literary executor. Cook had been trained as a mathematical physicist and had kept abreast with the newer experimental methods of investigation in the natural sciences as well as with the modern developments in philosophy, psychology and logic. His ideas in legal philosophy were greatly influenced by John Dewey, with whom Cook gave a joint seminar on jurisprudence at Columbia.

(a) De Sloovere, On Looking into Mr. Beale's Conflict of Laws (1936), 13 N.Y. U.L.Q. Rev. 333, at p. 348, states that the term was first used by Dodd, The Power of the Supreme Court to Review State Decisions in the Field of the Conflict of Laws (1926), 39 Harv. L. Rev. 533, at pp. 535, 537.

(b) The Logical and Legal Bases of the Conflict of Laws (1924), 33 Yale L.J. 457, and subsequent articles, republished in his book bearing the same title (1942). See also his "An Unpublished Chapter: In Conclusion" (1943), 21 Can. Bar Rev. 249, 37 Illinois L. Rev. 418. Among the reviews of his book are the following: Lorenzen (1943), 52 Yale L.J. 680; Cavers (1943), 56 Harv. L. Rev. 1170; Keith (1943), 59 L.Q. Rev. 378; Morris (1943), 59 L.Q. Rev. 379; Reiblich (1943), 28 Cornell L.Q. 376; Falconbridge (1943), 37 Illinois L. Rev. 375, 21 Can. Bar Rev. 329; Hancock (1944), 44 Columbia L. Rev. 579, 5 U. of Toronto L.J. 476. Noteworthy tributes to Cook are paid by Clark, Cary and Yntema (1944), 38 Illinois L. Rev. 341.

(c) (1943), 52 Yale L.J. 680.

(d) Cf. note (n) at pp. 18, 19, in the present chapter, *supra*. In chapter 30, § 2, use is made of Hohfeld's analysis of legal relations, as adopted in the Property Restatement of the American Law Institute. At the end of chapter 18 will be found a reference to an important article by Hohfeld on the conflict of laws; cf. p. 8, *supra*.

Cook is of course not the only Anglo-American writer who has ~~advocated a more~~ "realistic" approach to problems of the conflict of laws. A leading article by Lorenzen appeared almost at the same time (e) as Cook's original article on the Logical and Legal Bases of the Conflict of Laws (f), and various law reviews have published articles of great value by other American writers who may be described as "heretics" from the point of view of the Beale-Restatement theory of legislative jurisdiction and foreign created rights (g). Cook's book is of "exceptional importance because it is the first volume in which the method of the American realistic school and its approach to a considerable number of fundamental problems is set forth in detail" (h). There follow here merely some references to particular points of Cook's discussion not covered in earlier sections of the present chapter.

Cook accepts with equanimity (p. 46) the "baptism" of his method under the name of "scientific empiricism". He objects to the method which assumes fundamental postulates, and then deduces from them detailed conflict rules, without sufficient or any investigation of the bases upon which the postulates are supposed to rest and without sufficient or any investigation of the social convenience or practical expediency of the rules thus deduced and applied. He does not object to postulates (or assumptions); on the contrary he considers initial assumptions to be an essential element in the collection and intelligent study of data in the field of the conflict of laws, but, as in the field of physical science, such assumptions must be provisionally formulated in the light of past experience and must be used merely as tentative working hypotheses, subject to the possibility of revision and improvement as the enquiry proceeds (pp. 47, 70).

Consequently, we find running through the Cook's discussion, firstly, his criticism of fundamental postulates commonly assumed in the conflict of laws (some of them inconsistent with others), and, secondly, his insistence that a conflict rule should not be a mere deduction from a postulate, but should always be based on social convenience and practical expediency and should be expressed in terms which suggest its real basis. If a choice has to be made between conflicting rules,

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(e) See note (r) in § 1(2) of the present chapter, *supra*, p. 14.

(f) See note (b) in the present § 2(3), *supra*.

(g) See, e.g., the articles cited in note (t) in chapter 3, § 1, at p. 40, *infra*.

(h) Lorenzen, 52 Yale L.J. at p. 683.

the basis must be a pragmatic one—of the effect of a decision one way or the other, in giving a practical working rule. In this connection it may be that in some cases it makes little difference which rule is adopted, so long as it is reasonably clear and definite and after its adoption is not departed from in cases clearly falling within it, but in others clearly vital problems of social and economic policy must be considered before a wise choice between conflicting rules can be made (pp. 45, 46) (i).

The actual process in settling a situation of doubt—a 'new' case, if we are dealing with law—involves a comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a 'rule' or 'principle' within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those decisions have produced. If the points in which the new situation resembles the older situations already dealt with are thought to be the qualities the existence of which were decisive in leading to the decisions in the prior cases, the new case will be put under the old rule or principle. In doing this, the rule or principle as it existed has not been merely 'applied'; it has been extended to take in the new situation. In other words, however great the appearance of purely deductive reasoning may be, the real decision where a case presents novel elements consists in a redefining of the middle term of the major and minor premises of the syllogism; that is, of the *construction or creation of premises* for the case in hand, which premises did not preëxist. The statement of the premises of the deductive syllogism is therefore a statement of the conclusion which has been reached on other grounds, and not of the real reason for the decision. When once the premises have been thus constructed, the conclusion inevitably follows (pp. 43, 44).

One matter reserved for separate discussion is whether questions of the conflict of laws arising in what may be called intranational cases, that is, between two law districts within a single political unit, should be treated in a different manner from questions arising in international cases (j).

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(i) The "but" clause was added in 1942 to the original article of 1924.

(j) See chapter 11. At the end of § 2 of that chapter I make some reference also to the question (which is mentioned here because it might be regarded as one aspect of the general question discussed in the present chapter), namely, whether the Conflict of Laws Restatement (*supra*, pp. 10, 11, 14) itself needs restatement. Such restatement has been advocated by critics of the Restatement on various occasions, and more recently has again been advocated by Yntema in the Foreword to Rabel, *The Conflict of Laws: a Comparative Study*, vol 1 (1945).

## CHAPTER III.

### CHARACTERIZATION; INTRODUCTION\*

§ 1. Characterization, selection and application, p. 35.

§ 2. The problem of characterization, p. 39.

#### § 1. Characterization, Selection and Application

Let us suppose that a case comes before an English court (*a*) for decision, and that, by reason of the residence of the defendant, the domicile of the parties, the situation of a thing or other sufficient ground appropriate to the circumstances, the court has jurisdiction to hear the case and pronounce judgment. Let us further suppose that, by reason of the existence of some foreign element or elements in the case, it is contended that in order to reach a socially desirable solution the court ought to apply, not the ordinary rules of law of the forum appropriate to purely English transactions (that is, the local or domestic rules of the

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\*This chapter reproduces the first part of an article, entitled *Characterization in the Conflict of Laws*, published (1937), 53 *Law Quarterly Review* 235-247.

(*a*) Writing in the province of Ontario I might have said "an Ontario court," but it seemed simpler to localize the supposititious forum in the place of publication of the article. A court sitting in and for England and a court sitting in and for Ontario or one of the other provinces of Canada must each regard the other as a foreign court for the purpose of the conflict of laws, but as between England and any common law province of Canada the rules of the conflict of laws which their respective courts apply are theoretically identical, except so far as those rules have been modified by statute in England or in a Canadian province, as the case may be. A Quebec court must of course apply Quebec rules of the conflict of laws which differ in some respects from those prevailing in the other provinces and in England. See Johnson, *Conflict of Laws with Special Reference to the Law of the Province of Quebec*, vol. 1 (1933), vol. 2 (1934), vol. 3 (1937): cf. reviews by Read, 11 *Can. Bar Rev.* 647, 12 *Can. Bar Rev.* 676, 15 *Can. Bar Rev.* 739. The House of Lords or the Privy Council although actually sitting in England, must be regarded as a court sitting in and for the country or province from which the particular appeal is brought. Occasionally the Privy Council seems to have forgotten that it is not an English court and to have decided a case, or to have given reasons for judgment, as if the forum were English. See chapters 10 and 16. The point is of considerable importance if, as is submitted, a case should be decided from the point of view of the real forum, in which the law of England (in the narrow sense) is a foreign law.

law of England), but rules of law based or modelled on analogous rules of some foreign law. The conflict rules of the forum are designed to guide the court in deciding whether or to what extent it should have recourse to the rules of law of some foreign country, but it is frequently doubtful whether the question before the court falls within an existing conflict rule, and it is sometimes necessary for the court, in effect, to formulate a new conflict rule, analogous to existing rules (*b*)

One purpose of this chapter is to suggest that the court's enquiry should, in effect, if not formally or explicitly, be divided into three stages. These stages may, for convenience, be briefly designated as Characterization (*c*), Selection, and Application—the characterization of the question, the selection of the proper law, and the application of the proper law.

The court should, in the first place, characterize, or define the juridical nature of, the question upon which its adjudication is required (*d*). The ultimate object of the court's enquiry being to ascertain whether a given factual situation, in the view of English law, including its conflict rules, gives rise to rights, imposes obligations, creates a legal relation, an institution or an interest in a thing, the court must decide what is the legal nature of the question or questions involved in the case, including sometimes the characterization of particular rules of the laws of England and other countries which may be applicable. It is only when the court has characterized the question that it can decide whether that question falls within a given conflict rule of the forum or whether a new conflict rule should be formulated.

The court should, in the second place, select the proper law, that is, the law (whether that of England or that of some other country) indicated by its appropriate rule of conflict of laws as being the law which ought to govern the decision upon the subject or question already characterized. The conflict rule of

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(*b*) Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 45: "In making a choice between [conflicting] rules, it is obvious that here as elsewhere the basis must be a pragmatic one—of the effect of a decision one way or the other in giving a practical working rule." On the same page Cook quotes from Holmes, *Collected Legal Papers* 239, as follows: "I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which both cannot have their way."

(*c*) As to the word "characterization", see § 2, note (*a*), *infra*.

(*d*) See chapter 4.

the forum will of course merely indicate in general terms that a particular local element in the factual situation (as, for example, the domicile of a person, the place of making of a contract, or the situs of a thing) is the connecting factor, that is, the element which, for the purpose of the conflict rule, connects the factual situation with a particular country; and the court, following this conflict rule, is enabled, by the use of this connecting factor, to select the law of the country thus indicated as the proper law (e).

The court should, in the third place, apply the selected proper law to the factual situation for the purpose of deciding what, if any, legal consequences result from that situation or, if a thing is in question, what interests are created in the thing (f).

Each of the three suggested stages in the court's consideration of the case raises its own problems and will require further analysis and discussion, and the foregoing preliminary statement of the three stages has purposely been made as simple as possible.

In any of the three suggested stages of the court's enquiry, there may arise what may be called a conflict of conflict rules, or, in other words, a difference between a rule of the conflict of laws of the forum and the supposedly corresponding rule of the conflict of laws of some other country, or a difference between the supposedly corresponding conflict rules of two countries other than the forum. This difference between the conflict rules of two countries is of course to be distinguished from a difference between the local rules of law of the two countries, which gives rise to a question of conflict of laws.

While some of the matters included in the discussion of each of the three stages may go beyond questions of conflicts of conflict rules, and may not depend upon the fact that a separate kind of conflict may arise in each of the three stages, it should be mentioned that the tripartite division of the discussion coincides with Franz Kahn's classification of *Gesetzeskollisionen* or conflicts of conflict rules (g).

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(e) See chapter 5.

(f) See chapter 5. The word "apply" is used in the text as a convenient term, but is not strictly accurate, as has been pointed out in chapter 2, § 2 (2) (3).

(g) *Gesetzeskollisionen: ein Beitrag zur Lehre des Internationalen Privatrechts* (1891), originally published in 30 Jherings Jahrbucher für die Dogmatik des Heutigen Römischen und Deutschen Privatrechts, 1-143, republished in *Ahandlungen zum Internationalen Privatrecht von Franz Kahn herausgegeben von Otto Lenel und Hans Lewald* (München und Leipzig (1928), vol. 1, 1-123).

Kahn divides *Gesetzeskollisionen* (*h*) into three classes, as follows (*i*):

(1) *Ausdrückliche Gesetzeskollisionen*: conflicts which arise from the fact that the conflict rules of two or more countries are on their face different, as, for example, when the conflict rule of one country says that the *lex domicilii* governs a given question and the conflict rule of another country says that the question is governed by the *lex patriae* (*j*).

(2) *Kollisionen der Anknüpfungsbegriffe*: conflicts which arise from the fact that the conflict rules of two or more countries are on their face the same or substantially the same, but are in reality different because the connecting factor mentioned in the conflict rules is characterized in different ways in different countries, as, for example, if the conflict rules of two countries are apparently the same in that both say that the *lex domicilii* is the governing law, but domicile means one thing in the one country and another thing in the other (*k*).

(3) *Latente Gesetzeskollisionen*: conflicts which arise from the fact that although the conflict rules of two or more countries may be the same or substantially the same in terms and may use the same connecting factor in the same sense, nevertheless they may be different in effect because the question which is before the court for decision may be characterized differently in different countries (*l*).

While Kahn specifically designates conflicts of the third class as *latent*, and those of the first class as *express* (*ausdrückliche*), the word *latent* would be equally appropriate to conflicts of the second class, and the corresponding word appropriate to conflicts of the first class is *patent*, not *express*. Even the distinction between patent and latent conflicts may tend to

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(*h*) In Kahn's nomenclature a local rule of law is a *Sachnorm*, and a rule of the conflict of laws is a *Kollisionsnorm* (Abhandlungen, vol. 1, p. 161). What he calls a *Gesetzeskollision* is a conflict of *Kollisionsnormen* as distinguished from a conflict of *Sachnormen*, and includes a conflict between the supposedly corresponding rules of conflict of laws of two countries, whether those rules are formulated by statute or are a product of case law, etc.

(*i*) These classes are stated here in Kahn's order, although it will be in the reverse order that they will come up for discussion in chapters 4 and 5.

(*j*) Kahn, Abhandlungen, vol. 1, 6 ff.

(*k*) Kahn, Abhandlungen, vol. 1, 48 ff. Instead of *Anknüpfungsbegriff* (translated 'connecting factor' in the text) Kahn, at p. 162, uses the shorter form *Anknüpfung*.

(*l*) Kahn, Abhandlungen, vol. 1, 92 ff.

disappear as the result of more exact characterization of the question in the third class or the more exact formulation of the conflict rules.

## § 2. The Problem of Characterization

The problem of characterization, stated by Kahn in 1891, was six years later restated in an article, since become classic (*m*), by Bartin (*n*), who gave to the subject the name of the theory of *qualifications*, by which it is generally known. The word *qualification* in this sense has been transliterated from French into various languages, but it would appear to be unsuitable for use in English, because the English word *qualification* already has several meanings, different from that of the French word. On this account I have elsewhere suggested the word *characterization* as the most suitable English word to express the meaning of *qualification* for the present purpose (*o*).

Subsequently the problem has been discussed in many books on private international law in various countries of continental Europe, and in recent years some notable monographs have been specifically devoted to the subject (*p*).

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(*m*) Niboyet, *Manuel de Droit International Privé* (1928) 497, note 1.

(*n*) Bartin, *De l'Impossibilité d'arriver à la Solution Définitive des Conflits de Lois*, in *Clunet* (1897) 225-255, 466-495, 720-728, and republished in Bartin, *Etudes de Droit International Privé* (1899) 1-82. The author's mature views on the subject have been restated in the first volume of his *Principes de Droit International Privé selon la Loi et la Jurisprudence Françaises* (1930) 200 ff., 221 ff. See also Bartin, *La Doctrine des Qualifications et ses Rapports avec le Caractère National du Conflit des Lois*, in *Recueil des Cours, Académie Internationale de Droit International*, vol. 31 (1930, vol. 1) 565 ff.

(*o*) *Law of Mortgages* (2nd ed. 1931) 734; cf. [1932] 4 D.L.R. 1, at p. 9; *Contract and Conveyance in the Conflict of Laws* (1938), 81 U. of Penn. L. Rev. 661, at p. 663, and [1934] 2 D.L.R. 1, at p. 2.

(*p*) Rabel, *Das Problem der Qualifikation* (1931), 5 *Zeitschrift für Ausländisches und Internationales Privatrecht* 241, republished in revised form in Italian, *Il Problema della Qualificazione* (1932), 2 *Rivista Italiana di Diritto Internazionale Privato e Processuale* 97, and in French, *Le Problème de la Qualification* (1933), 28 *Revue de Droit International Privé* 1; Neuner, *Der Sinn der Internationalprivatrechtlichen Norm, eine Kritik der Qualifikationstheorie* (Brünn, 1932); Meriggi, *Saggio Critico sulle Qualificazioni* (1932), 2 *Riv. it. dir. int. pr.* 189, and *Les Qualifications en Droit International Privé* (1933), 28 *Rev. dr. int. pr.* 201. Neuner reviews many writers from Kahn to Rabel. Meriggi, in the first-mentioned article, reviews writers from Bartin to Neuner, grouping them in French, Italian and German schools respectively. As to Rabel and Neuner, see also Rhein-stein, *Comparative Law and Conflict of Laws in Germany* (1935), 2

Comparatively speaking, little has been written in English (*q*) on the general problem of characterization (*r*), although in many articles particular questions of characterization have been acutely discussed (*s*). Many articles have also been devoted to the methodology of the conflict of laws, with the view of focussing attention on the question how a desirable social or economic result may be reached by a decision in this way or in that rather than on the mechanical application of rules (*t*) and aggressively criticizing what is variously called by the critics the territorial or pseudo-territorial theory or vested or acquired rights theory of the conflict of laws (*u*).

No attempt is made in the present chapter to review the voluminous body of published material relating to the problem of characterization. My purpose is a more modest one, namely, to discuss some specific problems of characterization which are

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U. of Chicago L. Rev. 252, at pp. 261 ff. See also Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (Berlin 1932) 107-192. The periodicals cited above by their full title will be cited below in the abbreviated forms 'Riv. it. dir. int. pr.', and 'Riv. dr. int. pr.' respectively.

(*q*) I have left this sentence in the form in which it was originally published in 1937. Much has been written on the subject more recently.

(*r*) See, e.g., Lorenzen, *Theory of Qualifications in the Conflict of Laws* (1920), 20 Columbia L. Rev. 247; Beckett, *The Question of Classification ("Qualification") in Private International Law* (1934), 15 Brit. Y.B. Int. Law 46; cf. brief statement in Cheshire, *Private International Law* (1935) 9-14 (much elaborated in his second edition (1938) 24 ff.). See also Unger, *The Place of Classification in Private International Law*, *The Bell Yard* (No. 19, May, 1937) 3; Lorenzen, *The Qualification, Classification or Characterization Problem in the Conflict of Laws* (1941), 50 Yale L.J. 743, and the other references given in chapter 6.

(*s*) Various articles on particular questions of characterization will be mentioned in the course of the present chapter and chapter 4.

(*t*) See, e.g., Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 Yale L.J. 457, and other articles by the same writer, republished in his book bearing the same title (1942); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1934) 33 Yale L.J. 736, and review of Arminjon, *La Notion des Droits Acquis en Droit International Privé* (1935) 35 Columbia L. Rev. 630; Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 Yale L.J. 468; Cavers, *a Critique of the Choice of Law Problem* (1933) 47 Harvard L. Rev. 173, and review of the *Conflict of Laws Restatement* (1935) 44 Yale L.J. 1478; Heilman, *Judicial Method and Economic Objectives in the Conflict of Laws* (1934) 43 Yale L.J. 1082; Lorenzen and Heilman, review of the *Conflict of Laws Restatement* (1935) 83 U. of Penn. L. Rev. 555; Willis, *Two Approaches to the Conflict of Laws* (1936) 14 Can. Bar Rev. 1.

(*u*) As to the acquired rights theory, see chapter 2, § 1.

raised by reported cases in the Anglo-American legal system, especially in England and Canada, and, in the light of what has been written abroad on the general subject, to make some tentative suggestions as to a doctrine of characterization which might be suitable, both theoretically and practically, for use in Anglo-American conflict of laws. A few examples stated by foreign authors are discussed, because these examples seem to present useful points of contrast or comparison with English law, and I have, perhaps somewhat arbitrarily, selected some foreign authors for citation as being sufficiently representative of certain conflicting views material to the purpose of the chapter, without necessarily following those authors in their conclusions and without professing to give an adequate summary of their views.

The problem of characterization arises from the fact that the legal concepts expressed or implicit in different systems of law may vary from country to country. The differences in legal concepts are sometimes peculiarly complicated and subtle. They may arise from the mere fact that different languages prevail in different countries, so that a word in one language is only approximately equivalent to the supposedly corresponding word in another language, or even that two supposedly corresponding words express fundamentally different ideas. Apart from mere differences in language, there may exist fundamentally different legal concepts, which are not accidental or arbitrary but are the product of the whole historical development of different systems of law (*v*). These differences in legal concepts are especially likely to manifest themselves in differences in the arrangement and divisions of the law. A scheme of arrangement or division of rules of law presupposes a classification of the legal relations, institutions, interests or things to which the law relates (*w*), and in some cases a matter may be sufficiently characterized when it is assigned to its appropriate place in a given legal system. It would seem, however, that it is an inadequate statement of characterization to reduce it to mere classification (*x*).

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(*v*) An elaborate statement of the nature and causes of the variations in legal concepts prevailing in different systems of law is contained in Frankenstein, *Internationales Privatrecht*, vol. 1 (1926) 273 ff.

(*w*) Cf. *Bartin, Principes de Droit International Privé*, vol. 1 (1930) 224.

(*x*) The inadequacy of mere classification will be more apparent in the subsequent discussion of the question what it is that must be characterized in the conflict of laws.

In one respect Kahn's original statement of the problem of characterization is clearer than Martin's restatement of the problem (*y*), namely, because Kahn's point of departure is the conception that a situation is connected with a particular system of law by means of the appropriate connecting factor (*z*). Literally, Kahn does not speak of a situation but, like Savigny, speaks of a "legal relation", as being connected with a particular system of law (*a*). This language is, however, open to the objection that a legal relation results only from the application of some particular system of law to the facts of the situation; and the existence of a legal relation presupposes that the factual situation is already connected with some particular system of law, and it would be meaningless to say that it may be connected with some other system of law (*b*). What must be meant is that a factual situation is connected with a particular country and its law by means of a connecting factor, and that it depends upon the application of the particular system of law whether a legal relation results from the factual situation.

In other words, a purely factual situation dissociated from any particular system of law has no legal consequences, that is, it creates no legal relation, no legal rights, no legal obligations; the object of rules of the conflict of laws is to furnish a guide as to the law which should be applied to the facts of the situation, for the purpose of deciding what, if any, legal consequences follow from the factual situation; and a rule of the conflict of laws furnishes the necessary guide by specifying the connecting factor or place element which connects the factual situation with a particular country and its law. It may happen that some of the place elements of the situation are themselves not purely factual. For example, what the parties to an alleged contract said and what they did in certain places are matters of fact, but the place of making of the alleged contract may be a matter of law; and the place of residence of a person and his intention

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(*y*) See Neuner, *op. cit.*, (note (*p*), *supra*) 10-15, for a clear restatement and criticism of Kahn's views. Kahn's views are also discussed by Rabel (note (*p*), *supra*), *passim*.

(*z*) *Anknüpfung, élément de rattachement, etc.* The connecting factor is the place element in the factual situation which is specified in the appropriate conflict rule of the forum as the dominating element in the choice of the proper law. See chapter 5.

(*a*) Kahn, *Abhandlungen* (note (*g*), *supra*), vol. 1, pp. 48, 95 ff., 162.

(*b*) Cf. Rabel (1932) 2 *Riv. it. dir. int. pr.* 101-102, (1933) 28 *Rev. dr. int. pr.* 6-7; Neuner, *op. cit.* 17.

as to his future residence are matters of fact, but his domicile may be a matter of law (c). An English court, as a general rule, applies English rules as to the requirements for the acquisition of domicile even when the question is whether a person is or was domiciled in a foreign country (d). Furthermore, when the proper law has been selected by the aid of the appropriate place element, the factual situation to which the proper law is applicable is the situation dissociated from its actual place elements (e).

Although it is a factual situation, and not a legal relation, which is connected with a particular country by means of a connecting factor, it does not follow that it is a factual situation which must be characterized for the purpose of selecting the appropriate connecting factor and consequently for the purpose of selecting the particular system of law to be applied to the factual situation. The question what it is that must be characterized cannot indeed be divorced from the question what is characterization itself, and the further question by what law the characterization should be governed. An answer to all these questions is essential to the understanding of the meaning and operation of any rule of the conflict of laws. In particular the question what it is that is characterized is not always clearly stated by writers who discuss the problem of characterization (f).

In accordance with the theory that what is characterized is a legal relation in a wide sense, characterization has been defined as the determination of the juridical nature of a legal relation or an institution (g). Most of the writers who proceed from these premises feel themselves compelled by both practical and theoretical considerations to say that characterization must be

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(c) Or one of mixed law and fact. *Trottier v. Rajotte*, [1940] S.C.R. 203, at p. 217, [1940] 1 D.L.R. 433 at p. 445. Contrast *McMullen v. Wadsworth* (1889), 14 App. Cas. 631, and *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146, where the finding as to domicile seems to be regarded as one of fact. Cf. Farnsworth, *Domicil of Choice: 'Fact' or 'Law'* (1943), 59 L.Q. Rev. 219; comment (1945), 61 L.Q. Rev. 16.

(d) In chapter 5 the characterization of the connecting factor will be discussed as a matter distinct from the characterization of the question which is before the court.

(e) The point has been already mentioned in §1, *supra*. It will be further discussed in chapter 5, in connection with the application of the proper law.

(f) Cf. Neuner, *op. cit.* 17 ff.

(g) Cf. 10 *Répertoire de Droit International* (1931) 369; '*La qualification est la détermination de la nature juridique d'une institution*'.

governed by the *lex fori* (*h*), subject to exceptions upon which they are not in entire agreement (*i*). Other writers say, however, that characterization should not be based on the domestic concepts of the *lex fori*, and they seek in various ways to justify resort to other law or laws. For example, Despagnet (*j*), subject to reservations in favour of the public policy of the forum, advocates characterization in accordance with the law which properly governs the legal relation, and Gemma (*k*) advocates characterization from an international point of view.

On the other hand, Rabel (*l*) lays stress on the principle that the point of departure in a conflict of laws problem is not a legal relation (*m*), which *ex hypothesi* owes its existence to some particular system of law; and that a conflict rule, like a domestic rule of law, relates to a social relation or facts of life (or, in general terms, a factual situation), the function of the conflict rule being to indicate what system of law is applicable to the situation and that of the domestic rule being to afford a definitive solution (*n*). Similarly, according to Rabel,

(*h*) In the sense of the local law of the forum.

(*i*) See, e.g., Bartin, *Principes*, vol. 1 (1930) 227 ff.; Niboyet, *Manuel de Droit International Privé* (1928) 498 ff. Representative writers who also advocate characterization by the *lex fori* are Iewald, Raape and Gutzwiller in Germany, and Cavaglieri and Diena in Italy, and Arminjon. The views of all the writers above named are discussed in Meriggi's article (1932) 2 Riv. it. dir. int. pr. 189. Melchior, *Grundlagen des Deutschen Internationalen Privatrecht* (1932), 109 ff. gives a longer list. The inevitable brevity of the account here given of various theories precludes the possibility of a particular discussion of the various views of the writers. All that can be attempted is to mention in a general way certain general notions which are material to the main discussion in the text.

(*j*) *Précis de Droit International Privé* (1909); cf. Meriggi (1932) 2 Riv. it. dir. int. pr. 206 ff., and Neuner, *op. cit.* 18—19.

(*k*) *Propedeutica al Diritto Internazionale Privato* (1899) 91 ff.; cf. Meriggi (1932) 2 Riv. it. dir. int. pr. 529; Neuner, *op. cit.* 19.

(*l*) (1932) 2 Riv. it. dir. int. pr. 101 ff.; (1933) 28 Rev. dr. Int. pr. 6 ff. As to the same point, see now Rabel, *The Conflict of Laws: a Comparative Study*, vol. 1 (1945) 45-46. Reference should be made here to the whole of the learned author's discussion, at pp. 42-60 of the volume cited, of the problem of characterization. I have not attempted, however, to rewrite the present chapter or the next two chapters, which reproduce articles originally published in 1937, so as to include a discussion of what has been written since that time on the general problem, though I have, especially in chapter 4, tried to bring up to date the discussion of some topics.

(*m*) Whether concrete (that is, a specific relation in question), or abstract.

(*n*) (1933) 28 Rev. dr. int. pr. 6-7; (1932) 2 Riv. it. dir. int. pr. 102.

although a conflict rule must be based upon notions more or less impressed with a juridical character, the object of characterization should not be a legal relation, which is the creature of a particular system of law, but an abstract concept, which is neither that of the *lex fori* nor that of any other particular system of law (o), and which is to be regarded from a universal or international point of view or as dissociated from any particular system of law and to be characterized on the basis of a study of comparative law. The result would be to emancipate characterization from its subjection to the *lex fori*, but the process of characterization would admittedly be difficult (p). Rabel's doctrine is developed by Neuner, who suggests that the problem of characterization arises from the deficiency or insufficiency of existing conflict rules and would be solved or eliminated by the new formulation of conflict rules based upon concepts susceptible of being applied to all systems of law. According to this view, it is a mistake to attempt to find a solution for every case within the terms of the relatively small number of existing conflict rules, and an elaboration and refinement of those rules must be undertaken in the light of individual cases (q).

Characterization based on the results of the study of comparative law has been advocated by Beckett (r) in the following words:

The rules of Private International Law are rules to enable the judge to decide questions as between different systems of internal law—either his own internal law and a given foreign law or between two foreign systems of law. These rules, therefore, if they are to perform the function for which they are designed, must be such, and must be applied in such a manner, as to render them suitable for appreciating the character of rules and institutions of all legal systems. Classification is simply an interpretation or application of the rules of Private International Law in a concrete case and the conceptions of these rules must, therefore, be conceptions of an absolutely general character. As I have already said, these conceptions are borrowed from analytical jurisprudence, that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professedly universal application—not principles based on, or applicable to the legal system of one country only.

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(o) Rabel (1932) 2 Riv. it. dir. int. pr. 261.

(p) Rabel (1932) 2 Riv. it. dir. int. pr. 151; (1933) 28 Rev. dr. int. pr. 57.

(q) Cf. Neuner, *op. cit.* 24-28, 131-135; Meriggi (1932) 2 Riv. it. dir. int. pr. 273-276.

(r) The Question of Classification ('Qualification') in Private International Law (1934) 15 Brit. Y. B. Int. Law 46, at pp. 58-59.

Cheshire (s), after quoting the whole of the foregoing passage, adds: "There can be little doubt that logically and scientifically this theory is incontrovertible, but it is doubtful whether so far it has been adopted, at any rate consciously, by English courts".

It would seem that characterization on the basis of comparative law, notwithstanding the benediction thus given to it by two English writers, must be regarded as a theoretical, and not a practical, method of characterization in English conflict of laws. It is of course highly desirable, especially in a subject such as the conflict of laws, which should be cosmopolitan in its outlook, and which, as compared with other branches of English law, is still in a formative stage, that the judges should attempt to resist the paralyzing influence of the doctrine of *stare decisis*, and should in the light of wider experience in dealing with a variety of conflict problems, and a larger knowledge of the international aspects of conflict theories, reconsider solutions which have sometimes in the past been stated in too general, or even too casual, a manner. Characterization on the basis of comparative law would seem to require a supranational class of judges, deeply learned in comparative law, capable of dissociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems. Probably some *via media* might, however, be found, somewhere between the two extremes of characterization by the *lex fori* as commonly understood and characterization on the basis of comparative law.

What it is that must be characterized is not stated precisely by either Beckett or Cheshire. The passage quoted from Beckett would suggest that it is the concepts expressed in rules of conflict of laws that must be characterized, but it would appear from the discussion of the subject by both writers that what they have primarily in mind is that a judge must characterize, sometimes a rule or institution of the domestic law of the forum, sometimes a rule or institution of foreign law (*t*). It is true that a court must sometimes characterize a rule or institution of the law of the forum or of the domestic law of

(s) Private International Law (1935) 14. In his second edition (1938) 24 ff., Cheshire develops a different theory.

(t) Beckett, *op. cit.* 61, states as a separate class, "cases not involving any characterization of a rule or institution of internal law", but the examples which occur to him all relate to jurisdiction.

some foreign country, but it would seem that logically the characterization of a rule of domestic law should be preceded by a characterization of the question which is before the court, with a view of selecting the connecting factor or factors appropriate to the question or to different aspects of the question in accordance with the conflict rules of the forum. This characterization of the question—which may be provisional and subject to revision—lays the foundation for the court's consideration of the concrete provisions of the laws of various countries which are or may be applicable in the light of the characterization of the main question or different aspects of that question. Owing to the generality of the terms in which most of the existing conflict rules are expressed, and the variety and complexity of interests which may claim consideration in new situations, the court must sometimes, in effect, formulate a new conflict rule by analogy to existing rules with the view of reaching a socially desirable result in a situation which does not fall precisely within existing rules. There would seem to be no practical or theoretical reason why the court, before deciding what law is or what laws are applicable, should not consult the different laws which may be applicable on different aspects of the question. In the next chapter an attempt will be made to state a method of characterization which might be adopted by English courts, and which indeed has been adopted to some extent, perhaps unconsciously, by English courts.

Conflicts between the conflict rules of different countries may arise (1) because the question may be characterized in one way in one country and in another way in another country (u), or (2) because the connecting factor is characterized in different ways in two countries (v), or (3) because the conflict rules of the two countries refer to different connecting factors (w); and some of the conflicts that arise may be irreconcilable. The doctrine of the *renvoi* will come up for consideration as a subsidiary problem of the problem of characterization in the second class of conflicts of conflict rules. It is true that in the third class of conflicts the *renvoi* will arise in a somewhat different form, not so closely connected with characterization, but the discussion of *renvoi* and characterization as related problems may help to elucidate some of the mysteries of the *renvoi*.

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(u) Discussed in chapter 4.

(v) Discussed in chapter 5.

(w) Discussed in chapter 5.

## CHAPTER IV

### CHARACTERIZATION OF THE QUESTION<sup>1</sup>

- § 1. Conflict of characterization; parental consent to marriage; formalities and capacity, p. 48.
- § 2. Characterization by the *lex fori* of a rule of law in its context, p. 53.
- § 3. Formalities and capacity again, p. 58.
- § 4. Formalities of contract and procedure; Statute of Frauds, p. 60.
- § 5. Matrimonial property and succession, p. 69.
- § 6. Administration and succession, p. 76.
- § 7. Property, contract and conveyance, p. 77.
- § 8. Status, capacity and incidents of status, p. 79.

#### § 1. Conflict of Characterization; Parental Consent to Marriage; Formalities and Capacity.

The particular case of a requirement of parental consent to the marriage of a minor, which exists in many systems of law, will be discussed in some detail; not only because it is a controversial topic in English conflict of laws, but also because it is apt to be characterized in different ways in different systems of law. The topic happens to afford peculiarly suitable material for the discussion of characterization in general and the problems arising from conflicts as to characterization; and the suggestions to be made as to the right method of approach to the problem of characterization may be more clearly stated in the first instance in their application to a single topic.

The storm centre in English conflict of laws is the judgment delivered by Sir Gorell Barnes on behalf of the Court of Ap-

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<sup>1</sup>This chapter reproduces portions of an article, entitled *Characterization in the Conflict of Laws*, published (1937), 53 *Law Quarterly Review* 247-258, 537-546, and an article, entitled *Conflict of Laws: Examples of Characterization*, published (1937), 15 *Canadian Bar Review* 215-246. All the sections of the former articles have been revised, one (§4 relating to the Statute of Frauds) has been substantially rewritten and enlarged, and two others (§§ 6 and 7) have been abbreviated, with cross-references to other chapters, so as to avoid repetition.

peal in *Ogden v. Ogden* (a). In this case the marriage celebrated in England of a woman domiciled in England to a man domiciled in France was held to be valid in England, although the marriage was voidable in France and was annulled there because the man, 19 years of age, had not obtained his parents' consent to the marriage as required by French law (b). The result reached in this case was grotesque from a social point of view (c), namely, that in France the woman's marriage to A had been declared null and therefore her subsequent marriage in England to B was valid; whereas in England she was still the wife of A and was therefore not the wife of B, and not only she was not entitled there to a declaration of the nullity of her marriage with A (who had married another woman in France), but by reason of A's being domiciled in France an English court had no jurisdiction to grant a decree of divorce. The case seemed to be authority for three propositions, namely, (1) that a requirement as to parental consent to marriage is to be characterized as part of the formalities of celebration of marriage, (2) that even capacity to marry is governed by the *lex loci celebrationis*, and (3) that the French decree of nullity was not entitled in the circumstances to be recognized as valid in England. The second proposition has never been generally accepted, and does not require discussion in the present chapter (d). It may be asserted with some confidence that the third proposition is no longer tenable. In *Salvesen or von Lorang v. Administrator of Austrian Property* (e) it was held by the House of Lords that in the case of a marriage void *ab initio* a decree of annulment made by a court of the common domicile of the parties is entitled to recognition elsewhere. Independently of the question whether the jurisdiction of the court of the

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(a) [1908] P. 46, supplemented by the remarks of the same judge, speaking for himself, in *Chetti v. Chetti*, [1909] P. 67.

(b) For further discussion of *Ogden v. Ogden*, see chapter 40, § 8.

(c) If *Ogden v. Ogden* were to be followed in Ontario, an equally grotesque situation might easily arise in the case of a marriage celebrated in Ontario between parties who are, or one of whom is, domiciled in Quebec. See the recent case of *McClure v. Holford*, note (e), *infra*.

(d) As to the law governing capacity to marry, see chapter 40, § 9.

(e) [1927] A.C. 641. For further discussion of this case, see chapter 40, § 8. As to the applicability of the principle of the decision to the question whether a decree of annulment made by a court in Quebec on the ground of lack of parental consent is entitled to recognition in Ontario, see my comment (1946), 24 Can. Bar Rev. 219, on *McClure v. McClure*, since reported *sub nom. McClure v. Holford*, [1946] Revue Légale 126.

domicile is exclusive in any circumstances, as, for example, in the case of a marriage that is voidable, not void (*f*), the principle of the *von Lorang* case would seem clearly to be applicable to the case of a voidable marriage if the decree of annulment was made by a court of the country of the husband's domicile, because until the marriage was annulled the wife's domicile would be the same as that of her husband. In *Ogden v. Ogden* it would appear that the marriage was merely voidable by French law (the only law under which any objection to the validity of the marriage arose), and it would seem to follow that by reason of the domicile of the man in France the French decree of nullity was entitled to recognition in England.

*Ogden v. Ogden* being thus discredited from the jurisdictional point of view, the way is open to reconsider the first proposition for which the case seemed to be authority, namely, that parental consent should be characterized as part of the formalities of celebration of marriage. My own submission is that a requirement as to parental consent cannot be characterized in the abstract and for all cases either as a matter of formalities of celebration or as a matter of capacity to marry, but that in one case and in one context it may be formalities and in another case and in another context it may be capacity.

The reasons which probably led English courts to characterize a requirement as to parental consent as being part of the formalities of marriage are significant. According to the former Roman canon law (before the promulgation of the *Tametsi* Decree of the Council of Trent) a marriage *per verba de praesenti*, without priest or ceremony, without cohabitation and without parental consent, was valid. In England as well as Scotland the canon law of marriage prevailed (*g*), but it was changed in England by Lord Hardwicke's Act (1753), which not only required the presence of an episcopally ordained clergyman, but also contained provisions as to parental consent. In the context in which these provisions occurred they might well be characterized as part of the formalities of marriage, and therefore as relating only to marriages celebrated in England. In fact, when minors domiciled in England eloped to Scotland in order to get married without parental consent, the English

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(*f*) See the discussion of *Inverclyde v. Inverclyde*, [1931] P. 29, in chapter 40, § 7, and in chapter 42.

(*g*) See chapter 40, § 10.

courts held that the marriages celebrated in Scotland were valid in England. Dicey (*h*) suggests that in the earlier cases the English courts did not distinguish between formalities of marriage and capacity to marry and as regards both held that the validity of a marriage depended solely on the *lex loci celebrationis*, and that subsequently, when they began to distinguish between formalities and capacity and to regard capacity as being governed by the *lex domicilii*, they felt obliged, consistently with the earlier cases, to say that parental consent was part of the formalities. In truth, however, the dilemma stated by Dicey did not really exist, or, to put the matter in other words, the English courts might have held that a requirement of English law should be characterized as part of the formalities, and that it was therefore inapplicable to marriages of English persons celebrated in Scotland or elsewhere outside of England; and, quite consistently, they might have held that a requirement of French law as to parental consent should be characterized as a matter of capacity, and that it was therefore applicable to a marriage celebrated in England of persons domiciled in France. When the latter situation came before English courts, they failed, however, to make the distinction just stated, and in *Simonin v. Mallac* (*i*) and *Ogden v. Ogden* (*j*) they held the marriages to be valid, because they were celebrated in accordance with the *lex loci celebrationis* (England), notwithstanding that both parties in the first case and the man in the second case were domiciled in France and had not obtained the consent of their parents as required by French law.

Reference should be made to the distinction drawn by Westlake (*k*) between a requirement as to parental consent which is essential and absolute in the sense that a party is incapable of marrying without that consent (as, for example, the requirement of article 148 of the French Civil Code, in question in *Ogden v. Ogden*), and a requirement, as to parental consent which is non-essential and conditional, in the sense that a party may, after doing certain formal acts, marry without that consent (as, for example, the requirements of articles 151 and 152 of the French Civil Code, as they stood when *Simonin v.*

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(*h*) Conflict of Laws (5th ed. 1932), notes to his rule 182.

(*i*) (1860), 2 Sw. & Tr. 67.

(*j*) [1908] P. 46.

(*k*) Private International Law, §§ 23, 25.

*Mallac* was decided). A requirement of the former kind should, according to Westlake, be characterized as a condition of capacity, while a requirement of the latter kind should be characterized as part of the formalities of marriage. Westlake's view has the merit that it requires an English court to examine the concrete provisions of the foreign law which may on some characterization of the matter of parental consent be applicable, but it would appear that according to Westlake the examination of the foreign law consists in looking merely at those provisions of the foreign law specifically relating to parental consent, and that the characterization of those provisions consists in assigning them to the categories of capacity and formalities respectively already defined *a priori* in accordance with the concepts of English law.

Cheshire (1) regards a requirement of parental consent to a marriage as a matter of primary characterization, and therefore to be characterized in accordance with the concepts of English law, without regard to its characterization in French law. On this basis he approves of the result of *Simonin v. Mallac*, but considers that *Ogden v. Ogden* is unjustifiable, in effect adopting Westlake's distinction. Robertson (m) regards the matter as one of secondary characterization, to be decided in accordance with French law, and on this basis conjectures that by that law article 148 would be characterized as capacity and article 151 as formalities, thus reaching the same result as Westlake and Cheshire.

Beckett (n), on the contrary, expresses his personal view that effect should be given outside France to both article 148 and article 151 (as well as article 144, which clearly relates to capacity to marry, and article 170, which does not) in the case of marriages between French persons wherever celebrated, because all these provisions are personal law and family law in the French Civil Code, and that even provisions relating to formalities which are intended to safeguard family interests by the personal law should be respected elsewhere. Admittedly, however, English courts have never gone further than to recognize that the personal law applies to "capacity" or other matters of intrinsic validity, and as regards parental consent they

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(1) *Private International Law* (2nd ed. 1938) 34-37, 229-234.

(m) *Characterization in the Conflict of Laws* (1940) 239 ff.

(n) *The Question of Classification ("Qualification") in Private International Law* (1934), 15 *Brit. Y.B. Int. Law* 46, at pp. 55, 56, 77 ff.

erroneously characterized articles 148 and 151 as relating to formalities, because in English domestic law a requirement of parental consent had rightly been so construed.

It is submitted that the result reached by Beckett is preferable to that reached by Westlake, Cheshire and Robertson. More recently Rabel (o) has discussed the subject of parental consent to a marriage in English conflict of laws against the background of doctrines prevalent in continental Europe. He describes *Ogden v. Ogden* as a "very much discredited" authority indeed, and points out that in French law a requirement of parental consent is one of the *formes habilitantes*, "understood in France to have nothing to do with formalities."

## § 2. Characterization by the Lex Fori of a Rule of Law in its Context.

At this point in the discussion special mention should be made of two cases in the Supreme Court of Canada, namely, *Kerr v. Kerr and the Attorney-General for Ontario* (p), and *Attorney-General for Alberta and Neilson v. Underwood* (q). In the former case the validity of a statute of the province of Ontario, in the latter case the validity of a statute of the province of Alberta, was in question. In each case the statute required parental consent as a condition of the validity of the marriage of a minor in certain circumstances, and the validity of the statute depended on its being legislation in relation to a matter coming within the words "the solemnization of marriage within the province" in section 92 of the British North America Act, 1867 (defining the scope of the provincial legislative powers). as distinguished from "marriage and divorce" in section 91 (defining the scope of the Dominion legislative powers). In each case the provincial statute was held to be *intra vires*, but in each case an important reservation was stated.

In the *Kerr* case, Duff C.J. said:

I must not be understood as expressing the view that it would not be competent to the Dominion, in exercise of its authority in relation to the subject of "marriage", in matters which do not fall within the subject of "solemnization of marriage", to deprive minors domiciled in Canada of the capacity to marry without the consent of their parents. No such question arises here, and it is quite unnecessary to pass an opinion upon it. The authority of the Dominion to impose

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(o) *Conflict of Laws: a Comparative Study*, vol. 1 (1945) 266-268.

(p) [1934] S.C.R. 72, [1934] 2 D.L.R. 369.

(q) [1934] S.C.R. 635, [1934] 4 D.L.R. 167.

upon intending spouses an incapacity which is made conditional on the absence of certain nominated consents is not in question.

In the *Underwood* case, Rinfret J., delivering the judgment of the court, said:

The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage. Solemnization of marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it. The statute of Alberta, in its essence, deals with those steps or preliminaries in that province. It is only territorial. It applies only to marriages solemnized in Alberta and it prescribes the formalities by which the ceremony of marriage shall be celebrated in that province. It does not pretend to deprive minors domiciled in Alberta of the capacity to marry outside the province without the consent of their parents. Moreover, it requires that consent only under certain conditions and it is not directed to the question of personal status.

It must further be understood that our judgment does not express any view as to the competency of the Dominion, in the exercise of its proper authority, to legislate in relation to the capacity to marry of persons domiciled in Canada. In the absence of legislation by the Dominion, that question does not arise here and is fully reserved. All that we decide in regard to it is that the Dominion legislation, as it stands, does not affect the present case.

Thus a provincial statute may provide that parental consent shall be a condition of validity of the marriage of a minor, if it appears that the purpose of the statute is to deal only with formalities of solemnization of marriage within the province and not to create any incapacity, even on the part of a minor domiciled in the province, with regard to a marriage solemnized elsewhere. Similarly, it is probable that parental consent to the marriage of a minor might be required by a Dominion statute, if it appears that the purpose of the statute is to deal with capacity to marry, not formalities of solemnization, as, for example, if the requirement of parental consent is not limited to marriages celebrated in Canada, but applies to all minors domiciled in any province of Canada without regard to the place of celebration.

There is an obvious analogy between the problem of characterization as it may present itself in the conflict of laws, and as it may present itself in connection with legislative power in Canada. In order to determine whether a particular statute is legislation in relation to a matter coming within a particular class of subjects in s. 91, or in s. 92, of the British North America Act, 1867, the true nature and character of the legislation must be determined, and regard must be had to what the legislation was aimed at or devised for, what object it had in view. In the conflict of laws, also, the classes of questions mentioned in

various conflict rules are described in such general terms as sometimes to render the rules ambiguous, and in order to decide whether a particular provision of the law of a given country relates to a matter which falls within the question mentioned in one rule or that mentioned in another rule, it is necessary to determine the true nature or character of the provision in question.

While the judgments in the *Kerr* and *Underwood* cases relate to legislative power in Canada and not the conflict of laws, the cases are, as it seems to me, peculiarly useful, because they involved a question of the characterization of a requirement as to consent of parents as being either a matter of formalities of celebration or a matter of capacity or intrinsic validity, and the method of approach adopted in those cases for the purpose of legislative power in Canada would seem to be equally applicable for the purpose of the conflict of laws.

In order to state this method of approach as applied to the conflict of laws I take as examples, firstly, a marriage celebrated in England (or Ontario) between parties domiciled in France (or Quebec), and, secondly, a marriage celebrated in France (or Quebec) between parties domiciled in England (or Ontario), it being assumed in each case that the question of validity of the marriage arises in an English (or Ontario) court. In each case the marriage must be formally or extrinsically valid according to the proper law governing formalities, and must be a marriage between parties who are capable of marrying each other and must be in other respects intrinsically valid according to the proper law governing capacity and other matters of intrinsic validity.

In the case of a marriage celebrated in England between parties domiciled in France, the law of England must of course be complied with as regards all essential matters which are characterized by English law as matters of formalities or formal or extrinsic validity. If it is assumed that there is no provision of English law making parental consent essential to the validity of marriages celebrated in England, the *lex loci celebrationis* consists only of requirements as to licence, notice, banns, officiating minister or officer, and the like. (If the marriage were celebrated in Ontario under the law which was in force when *Kerr v. Kerr* was decided, the requirements of the *lex loci celebrationis* as to parental consent would also have to be complied with, these requirements being part of the law of Ontario as to

formalities.) In the next place the law of France must be complied with as to all essential matters which are characterized by English conflict of laws as matters of capacity or intrinsic validity. In order to characterize the requirements of French law the English court must examine the concrete provisions of the French law of marriage, not merely the relevant provisions as to parental consent or other alleged grounds of invalidity dissociated or isolated from their context, but the whole title or group of chapters and articles relating to marriage. The English court should then imagine that this title or group of chapters and articles is transferred to English law or enacted in an English statute, and then characterize the requirement as to parental consent, or as the case may be, as it occurs in the context of the supposititious English law of marriage. In all probability the result would be that the court on this basis would characterize both the absolute or indispensable requirement as to parental consent and the conditional or dispensable requirement as to parental consent as a matter of capacity or intrinsic validity, and not as matter of formalities or extrinsic validity, but I am primarily concerned at the present moment with the method of approach rather than the result. The characterization should, in an English court and for the purpose of English conflict of laws, be made in accordance with the concepts of English law, but the thing which has to be characterized is a requirement as to parental consent regarded in the light of its context in the French law of marriage, construed as if it were an English statute, and is not either a requirement as to parental consent transferred to English law without its context or a requirement as to parental consent in its actual context in English law. If I have not misread Melchior (*r*), characterization in the manner just suggested is characterization in accordance with the *lex fori* as explained by him, although it is not characterization in accordance with the *lex fori* as stated by some other writers.

In the case of a marriage celebrated in France between parties domiciled in England, any requirement of the present English law as to parental consent would be immaterial, because it would be characterized in English law as being a matter of formalities and therefore as being applicable only to marriages celebrated in England. This was in fact the ground upon which marriages celebrated in Scotland or elsewhere were held to be valid in

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(*r*) Grundlagen des Deutschen Internationalen Privatrecht (1932) 122-123.

England, notwithstanding that the parties were minors domiciled in England who had not obtained the consent of their parents as required by English law. The result would be the same if the parties were domiciled in Ontario and were married elsewhere without the parental consent, if any, required by Ontario law. On the other hand, if the marriage is celebrated in a country in which the law is similar to what the law of Ontario was when *Kerr v. Kerr* was decided, parental consent would be required as part of the *lex loci celebrationis* relating to formalities. If a marriage is celebrated in France between parties domiciled in England (or Ontario), the requirement of French law as to parental consent should logically be immaterial to the question of the validity of the marriage in England (or Ontario), if on the principle already discussed an English (or Ontario) court characterizes the requirement in its context in French law as being a matter of capacity or intrinsic validity; the French law should have no application to the marriage except to the extent that *qua* the *lex loci celebrationis* it prescribes the formalities of celebration (as to which the provisions of the French Civil Code relating to parental consent would *ex hypothesi* be irrelevant).

As will appear in the subsequent discussion (s), the suggested method of approach to the problem of characterization, though it may not have been consciously or deliberately adopted by an English court, is consistent with what has been done in some English cases and is not in any sense revolutionary. In many cases the judgments do not disclose the court's attitude or its manner of approach to the problem of characterization, but the reasons for this ignoring of the problem are often fairly obvious.

(1) It sometimes happens that there is no possible or probable conflict of characterization and therefore no need to examine the concrete provisions of any foreign law in aid of the characterization of the matter; in this kind of a case a court may properly decide what law is applicable, before any foreign law is proved and in order to avoid the expense of the unnecessary proof of foreign law. (2) The categories of the *lex fori* and of a given law may be substantially the same, and in that event, on the foreign law being proved, either one of two things may happen; (a) an English court may appear to characterize a given matter in accordance with the *lex fori* without regard to the foreign law, or (b) an English court may appear simply

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(s) See § 4, in the present chapter, *infra*.

to adopt the characterization of the foreign law without regard to the *lex fori*.

### § 3. Formalities and Capacity Again

The second example used by Bartin in his explanation of his theory of characterization (*t*) is the well-known case of a Netherlander who makes a holograph will in France. Although the rules of conflict of laws of France and the Netherlands are in agreement in saying that capacity is governed by the national law and formalities by the law of the place of making, Bartin says that the question of the validity of the will is insoluble in the sense that the solutions will necessarily be different in the courts of France and those of the Netherlands respectively. In France the will is valid, because the question is characterized as a matter of form and the will is formally valid by French law. On the other hand, the law of the Netherlands forbids a Netherlander to make a holograph will, either at home or abroad, and therefore, according to Bartin, the question is characterized as a matter of capacity, and the validity of the will is governed by the testator's national law. While agreeing with Bartin that the law of the Netherlands renders the will invalid in the Netherlands, Melchior (*u*) denies that the matter is characterized by the law of the Netherlands as a matter of capacity.

Even from the French point of view Bartin's treatment of the question of characterization raised by his example does not seem to be adequate, and it is difficult to follow his view that there is an insoluble conflict of characterization. On the principles already stated in the present chapter, with particular reference to a requirement as to parental consent to the marriage of a minor, a better approach to the question would seem to be to say that the will must be formally valid by the law of the place of making and must be made by a person capable of making it by his national law. A French court ought therefore to decide that the will, although it is formally valid by the law of France, is intrinsically invalid by the law of the Netherlands and there-

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(*t*) La question des qualifications, discussed in his *Principes de Droit International Privé*, vol. 1 (1930) 221 ff. The second example is stated and discussed on pp. 224-227.

(*u*) *Grundlagen des Deutschen Internationalen Privatrecht* (1932) 143, note 2.

fore intrinsically invalid by French rules of conflict of laws (*v*). In other words, the subject to be characterized by the French court is not simply a holograph will in the abstract, but a question of formal and intrinsic validity and two separate provisions relating to holograph wills contained in the laws of France and the Netherlands respectively. Admitting that the provision of the French law as to holograph wills is properly characterized in France, or elsewhere, as a provision relating to formalities, and that the will is therefore formally valid in France, or elsewhere, the court must still consider whether the will is intrinsically invalid by the law which governs intrinsic validity, and for that purpose must examine the relevant provision of the law of the Netherlands, which by French rules of conflict of laws is the law governing intrinsic validity, at least as regards the capacity of the testator. Whatever might be the view of a court in the Netherlands as to the characterization of the provision in question, it is highly probable that in the view of a court in France, or elsewhere, a prohibition against a Netherlander making a holograph will, at home or abroad, would be characterized as a matter of capacity, governed by the personal law of the testator. As French law refers matters of capacity to the national law, the example now under discussion should not give rise to any conflict as between France and the Netherlands, the will being invalid in both countries.

If the Netherlander had made his holograph will in Quebec, and if, in order to avoid any patent conflict of connecting factors (*w*), we suppose that the testator was domiciled in the Netherlands, the problem of characterization would be exactly the same and the will would be invalid both in Quebec (*x*) and in the Netherlands. If the testator had made his holograph will in England or Ontario, and we suppose that the will related to moveables, the conflict rules of England or Ontario would refer the question of both formal and intrinsic validity to the law of the testator's domicile. If the testator were domiciled in the

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(*v*) From the point of view of an Italian court, see the trenchant criticism of Bartin's treatment of the case in Pachioni, *Elementi di Diritto Internazionale Privato* (1930) 175-178. See also the elaborate discussion of the case in Neuner, *op. cit.* 28-34; cf. the case of a holograph will made by a German minor, *ibid.* 35-38.

(*w*) To be discussed in chapter 5.

(*x*) By Quebec conflict rules the will would be intrinsically invalid because not made in accordance with the *lex domicilii* of the testator, notwithstanding that it would be formally valid because made in one of the local forms of the place of making.

Netherlands at the time of his death, there would be no problem of characterization, and the will would be invalid both in the Netherlands and in England or Ontario. If the testator, without changing his nationality, were domiciled in some country other than the Netherlands, there would be a patent conflict of connecting factors and the case would cease to be of interest on the point now under discussion.

#### § 4. Formalities of Contract and Procedure: Statute of Frauds.

The marriage cases already cited afford examples of marriages celebrated in England which have been held to be valid on the ground that they were formally valid by the *lex loci celebrationis*, and because the court rightly or wrongly characterized the provisions of some foreign law as a matter of formalities and as therefore being immaterial (*a*). The marriage cases also afford examples of marriages celebrated abroad and held to be formally valid because they complied with the *lex loci celebrationis*, or formally invalid because they did not comply with the *lex loci celebrationis*, as the case might be, without regard to the question whether the formalities were such as would have been required if the place of celebration had been England. The English cases as to marriages celebrated abroad do not, however, seem to raise any problem of characterization with regard to the particular distinction between formalities on the one hand and some question other than one of formal validity on the other hand. In some cases it was clear that the only question in controversy was one of formalities (*b*). In others it was equally clear that the question was not one of formalities, but related to some aspect of intrinsic validity (*c*). What would be interesting for the purpose of the present discussion would be the case of a marriage celebrated abroad, as to which there is doubt whether the alleged ground of invalidity is one of formalities or not, so that the selection of the proper law would not be free from difficulty. Although the marriage cases do not appear to afford examples of this situation, examples of an analogous situation in the field of contract law may be found

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(a) *E.g.*, *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67, and *Ogden v. Ogden*, [1908] P. 46, in which, it is submitted, the court's characterization was wrong: see § 1 of the present chapter, *supra*.

(b) See chapter 40, § 10.

(c) See chapter 40, § 9.

in the well known and somewhat venerable cases of *Bristow v. Sequeville* (*d*) and *Leroux v. Brown* (*e*). These cases furnish especially useful material for the further consideration of the proposition already stated (*f*) that a court must characterize the subject or question by the *lex fori*, and that if the provision of some foreign law is or may be material, the court must characterize that provision in its context in the foreign law. In each case the contract was made abroad, and therefore its validity in point of form was to be determined by the law of the foreign place of making, in accordance with the conflict rule of the law of the forum that any matter of formal validity is governed by the *lex loci celebrationis* (*g*); and the main question for present discussion is to what extent that law is the governing law on the question whether the matter is one of formalities or not.

In *Bristow v. Sequeville* (*h*) the plaintiff sued to recover back £200 paid by him to the defendant in Prussia. The defendant denied the payment to him. At the trial the plaintiff proposed to prove the payment by certain receipts, given in Prussia. The defendant contended that the receipts were inadmissible in evidence in England, because they bore no stamp and were inadmissible by the law of Prussia. Even on the assumption that the law of Prussia had been sufficiently proved, it was held that the inadmissibility of the receipts by Prussian law was a matter of procedure, and that their admissibility or inadmissibility in England was therefore not governed by the law of Prussia. In the result the receipts were admitted in evidence, there being no English rule of procedure preventing their admission. It was, however, pointed out by Pollock C.B. and Alderson B., in argument, and by Rolfe B. in his judgment, that if it were proved that a receipt given or a contract made in a foreign country was void by the law of that country by reason of the absence of a stamp, it would be void in England (*i*).

The implications of the distinction just indicated are interesting with regard to the problem of characterization. The

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(*d*) (1850), 5 Exch. 275.

(*e*) (1852), 12 C.B. 801.

(*f*) See § 2 of the present chapter, *supra*.

(*g*) See chapter 14, § 2(c), where possible limitations of this general conflict rule are discussed. As to the place of making of a contract, see chapter 14, § 2(b).

(*h*) (1850), 5 Exch. 275.

(*i*) Approving the marginal note in *Alves v. Hodgson* (1797), 7 T.R. 241, and distinguishing *James v. Catherwood* (1823), 3 Dowl. & Ry. 190. See also *Clegg v. Levy* (1812), 3 Camp. 166.

logical deduction seems to be that to a certain extent an English court may be obliged to consult a foreign law in aid of the characterization of the question. It being premised that by English conflict of laws matters of formal validity are governed by the *lex loci celebrationis*, it follows that if a controversy arises in an English court as to a contract made abroad, and if it is contended that the contract is invalid in point of form, the court must consult the *lex loci celebrationis* (if duly proved) in order to ascertain whether the contract is formally valid or formally invalid by that law. The court must be informed as to the provisions of the foreign law and must characterize those provisions in their context in the foreign law, but it does not follow that the court must accept, or is bound by, the mode of characterization which a court of the foreign country in question or foreign experts might adopt (*j*). If the court finds that the contract is void for lack of essential formalities by the *lex loci celebrationis*, and not merely inadmissible in evidence, or not merely unenforceable by action by that law, *cadit questio*, and further consideration of the matter of characterization becomes unnecessary. If the court finds, however, that the contract is not void by reason of lack of essential formalities of the *lex loci celebrationis*, it must return to the task of characterizing the question. If, as in *Bristow v. Sequeville*, the only objection to the admissibility in evidence or enforceability in England of the contract is a provision of some foreign law which is held to be irrelevant because it relates to procedure, there remains no question of the conflict of laws. The English stamp laws are obviously not concerned with the stamping of a document in Prussia under a Prussian revenue law, and unless they require the stamping or restamping of the document in England (*k*), the absence of a stamp is immaterial.

If it appears, or is alleged, that by some foreign law a contract is intrinsically invalid, the situation is not so simple. Whereas with regard to alleged formal invalidity, the court must as a general rule apply the *lex loci celebrationis*, and as to any matter of procedure it must disregard the *lex loci celebrationis* and apply the domestic rules of the *lex fori*, in the case of alleged intrinsic invalidity the question how the matter should be characterized by the *lex fori* remains open, and the court

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(*j*) A good example of independent characterization by a New York court of certain provisions of the Cuban Civil Code is afforded by *Reilly v. Reinhart* (1916), 217 N.Y. 549, 112 N.E. 468.

(*k*) Cf. Foote, *Private International Law* (5th ed. 1925) 394 ff.

must consider what in all the circumstances is the proper law governing the matter as characterized (1). It may decide, without regard to the *lex loci celebrationis*, that the matter is one to be governed, not by the *lex loci celebrationis*, but by the *lex fori* or by the law of some other country as the proper law, or by the *lex fori* as stating some rule of stringent local public policy.

Whereas in *Bristow v. Sequeville* there was no objection from the point of view of English law to the validity and admissibility in evidence of the receipts in question, in *Leroux v. Brown* (m) the only objection raised to the enforceability of the contract in question was the English Statute of Frauds. The contract sued on was an oral contract made in France, by which the defendant, resident in England, employed the plaintiff, a British subject resident in Calais, France, at a salary of £100 per annum, to collect poultry and eggs in the neighbourhood of Calais for the purpose of shipment to the defendant in England. The employment was to commence on a future day and to continue for a year certain, and the contract, being one which was "not to be performed within the space of one year from the making thereof", was one of the kinds of contracts specified in s. 4 of the Statute of Frauds. The only question decided was the question whether the statute relates to the formalities of the contract, so as to apply only to a contract made in England, or whether it relates to the procedure for enforcing the contract, so as to apply to any contract of the kind specified, wherever made, upon which an action is brought in England. The court characterized the statute as procedural, and therefore the action was dismissed because of the lack of a note or memorandum of the contract as required by the statute. Whether the court was right in its characterization of the statute is extremely doubtful, and the matter deserves further consideration. The decision has been the subject of adverse comment in some English cases (n), and has been much discussed by various writers (o).

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(1) As to the proper law of a contract, see chapter 14, § 5(a), and chapter 16, § 3.

(m) (1852), 12 C.B. 801.

(n) See *Williams v. Wheeler* (1860), 8 C.B.N.S. 299 (Willes J.); *Gibson v. Holland* (1865), L.R. 1 C.P. 1.

(o) The following are some of the significant books and articles in which conflict of laws problems connected with the Statute of Frauds have been discussed: Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923), 32 Yale L.J. 311; Beckett, *The Question of Classification ("Qualification") in Private International Law*

In *Leroux v. Brown* stress was laid by the court upon the difference between the wording of s. 4, "no action shall be brought," and that of s. 17, "no contract . . . shall be allowed to be good" (*p*), but the reasoning is impaired by the fact that some time before the passing of the Sale of Goods Act, 1893, it had become the generally accepted view in England that "no contract . . . shall be allowed to be good" in s. 17 of the Statute of Frauds was equivalent to "a contract . . . shall not be enforceable by action," as now expressed in s. 4 of the Sale of Goods Act, 1893 (*q*).

The characterization in the domestic law of the forum of a statute providing that "no action shall be brought" is of course not conclusive as to its characterization for the purposes of a conflict rule of the law of forum. It is worth noting, however, that even in domestic English law s. 4 of the Statute of Frauds is not, strictly speaking, construed as a statute relating to evidence or the mode of proof of a contract, because the note or memorandum must be in existence before the commencement of the action (*r*), and is therefore an essential part of the cause of action and not merely a matter of procedure in the sense of a curial rule of the forum (*s*) with regard to the enforcement of a cause of action. The effect of the statute is to deny a cause of action against a person who has not signed a note or memorandum. The same expression, "no action shall be brought," occurs commonly in the statutes of limitation, and its effect in the conflict of laws relating to those statutes is discussed

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(1934), 15 Brit. Y.B. Int. Law 46, at pp. 69-70; Taintor, "Universality" in the Conflict of Laws of Contracts (1939), 1 Louisiana L. Rev. 695, at pp. 714 ff.; Robertson, Characterization in the Conflict of Laws (1940) 253-259; Cook, Logical and Legal Bases of the Conflict of Laws (1942) 156, 170, 225 ff.; Nussbaum, Private International Law (1943) 153-156; Rabel, Conflict of Laws: a Comparative Study, vol. 1 (1945) 50 ff.

(*p*) On this ground *Leroux v. Brown* was distinguished in the Ontario case of *Green v. Lewis* (1867), 26 U.C.Q.B. 618, in which it was held that s. 17 related to the "solemnities" of the contract and not to the procedure for its enforcement, and consequently that an oral contract for the sale of goods made in Illinois and valid and enforceable there in the absence of any statutory provision requiring writing, was valid and enforceable in Ontario.

(*q*) See, however, the dissenting view stated by Lord Finlay L.C. in *Morris v. Baron*, [1918] A.C. 1, at p. 11, for which there is much to be said: Holdsworth, History of English Law, vol. 6 (1924) 386, note 4.

(*r*) *Farr Smith & Co. v. Messers*, [1928] 1 K.B. 397.

(*s*) *Hamlyn & Co. v. Talisker Brewery*, [1894] A.C. 202. As to this case, see chapter 13.

in another chapter (*t*). It also occurs in other statutes, and the general problem of the effect of this form of words is discussed in another chapter (*u*) in connection with the distinction between substance and procedure. It is there submitted that a statute ought not to be characterized as procedural merely by reason of the use of this form of words.

The principle of the decision in *Leroux v. Brown* would seem to be equally applicable, under another clause of s. 4 of the Statute of Frauds, to a "contract or sale of lands, tenements and hereditaments, or any interest in or concerning them," so as to render unenforceable in England (*v*) or Ontario as the case may be, a contract to sell, charge or mortgage land (*w*), notwithstanding that the land is situated in another country by the law of which the contract is valid and enforceable. It was indeed only by the exercise of some ingenuity that an English judge in the case of *In re DeNicols* (*x*) avoided having to apply the statute, as regards land situated in England, to an implied contract for community of property resulting from the marriage without an antenuptial contract of two persons domiciled in France (*y*).

For the present purpose an interesting question in *Leroux v. Brown* (*a*) is one which was disposed of quite casually, and perhaps wrongly, namely, whether the contract was either invalid or unenforceable in France. Evidence was given on behalf of the plaintiff that the contract was enforceable in France; and Jervis C.J. assumed, and Maule J. stated, that such was the law of France. This conclusion seems difficult to reconcile with article 1341 of the French Civil Code which requires an *acte devant notaires ou sous signature privée* for a claim exceeding 500 francs (formerly 150 francs). This article occurs in a group of articles relating to proof, but the better opinion would ap-

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(*t*) See chapter 12.

(*u*) See chapter 13.

(*v*) In England this clause has been superseded by s. 40 of the Law of Property Act, 1925.

(*w*) By an exception which is hard to explain the statute does not apply to a mortgage by deposit of title deeds: *Ex parte Kensington* (1813), 2 Ves. & B. 79, 18 R.C. 30.

(*x*) [1900] 2 Ch. 410.

(*y*) Cf. discussion of the case by Westlake, *Private International Law* (5th ed. 1912), § 36a; Cheshire, *Private International Law* (2nd ed. 1938) 567-568; Robertson, *Characterization in the Conflict of Laws* (1940) 165-166. See also chapter 22, § 2(4).

(*a*) (1852), 12 C.B. 801.

pear to be that in France it is characterized as a rule relating to the formalities of a contract and not to the proof of it (*b*). Apart from speculations as to the reason why the article was not considered to be applicable to an action brought in France in the particular circumstances of *Leroux v. Brown*, the article itself suggests interesting questions. Inasmuch as the action in England was destined to fail because of a rule of English procedure, the fate of a hypothetical action in France became immaterial. Let us suppose, however, that the oral contract in question were one outside of the terms of s. 4 of the Statute of Frauds, or an oral contract for the sale of goods complying with s. 17 of the Statute of Frauds (s. 4 of the Sale of Goods Act, 1893) by virtue of the acceptance and receipt of the goods, and that it were within the terms of article 1341 of the French Civil Code. If made in France, it would be unenforceable and perhaps void in France. In England, on the principles already discussed in connection with *Bristow v. Sequeville*, a court might accept the French view that article 1341 relates to formalities, not procedure, and apply French law as the governing law. If the contract were made in England, a French court would probably hold article 1341 to be inapplicable, and if it were accurately informed of the English law might be obliged to hold the oral contract to be valid and enforceable. Again, on the actual facts of *Leroux v. Brown*, except that we suppose that the contract was made in England instead of France, the contract would be unenforceable in England, but would be enforceable in France.

The results in some of the examples just stated are obviously unsatisfactory, in that different characterizations of substantially similar statutes in different countries lead to one result if action is brought in one country and another result if action is brought in another country. A somewhat analogous situation exists with regard to statutes of limitation, generally characterized as procedural in Anglo-American countries and as substantive in other countries (*c*). The situation with regard to the Statute of Frauds and similar statutes in foreign countries is,

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(b) See Niboyet, *Manuel de Droit International Privé* (1928) § 557, pp. 678-679; Lorenzen, *French Rules of Conflict of Laws* (1927), 36 *Yale L.J.* 731 at p. 749; (1928) 38 *Yale L.J.* 165 at p. 167; Beckett, *The Question of Classification ("Qualification") in Private International Law* (1934), 15 *Brit. Y.B. Int. Law* 46 at p. 70; Robertson, *Characterization in the Conflict of Laws* (1940) 255.

(c) See chapter 12.

however, less clearcut, as appears from the valuable survey of the laws of different countries contained in Lorenzen's article on the Statute of Frauds and the Conflict of Laws (*d*). In France and most of the countries of continental Europe and in Latin America a statutory provision requiring writing for contracts of certain classes is characterized as being not procedural, but substantive, including in the latter a requirement as to the formalities of the making of a contract. So far as *Leroux v. Brown* is followed in Anglo-American countries, on the contrary, the Statute of Frauds is characterized as being procedural. On the other hand, while the wording of s. 4 has been followed in the majority of the states of the United States, in some of those states *Leroux v. Brown* has not been followed, and in other states the wording of s. 4 has been changed so as to make the reasoning of *Leroux v. Brown* inapplicable. Anglo-American courts are therefore not so nearly unanimous in characterizing the Statute of Frauds as being procedural as they are with regard to the statutes of limitation. The situation with regard to the Statute of Frauds is more confused. The need for some reconsideration of the rules of the conflict of laws nevertheless exists, and it would seem that some new approach is desirable.

Lorenzen, at the end of his article already cited, states his conclusions as follows:

(1) The fourth and seventeenth sections of the Statute of Frauds affect the substantive rights of the parties and not merely procedure, and matters falling within their provisions are controlled by the law governing the formalities of contracts in general.

(2) The Statute of Frauds is not expressive of a public policy from the standpoint of the conflict of laws, so as to preclude the enforcement of a foreign contract. A contract satisfying the requirements of the proper foreign law will therefore be enforced, although it, does not meet the requirements of the Statute of Frauds of the forum.

(3) The peculiar nature of the Statute of Frauds makes it desirable, at least as a matter of legislative policy, that contracts not enforceable under the Statute of Frauds of the state whose law determines the formalities of contracts in general shall be enforced nevertheless if they meet the requirements of the statute of the forum.

Taintor (*e*) suggests various possible ways of avoiding a conflict of characterization of foreign and domestic statutes requiring writing in the case of certain classes of contracts. What is needed is a "universal" characterization of such statutes, and the solution which he prefers, and which furnishes a principle

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(*d*) (1923) 32 Yale L.J. 311-338.

(*e*) "Universality" in the Conflict of Laws of Contracts (1939), 1 Louisiana L. Rev. 695, at pp. 713 ff.

which may be described as an "approach" to "universality", is that Anglo-American, or common law, courts should characterize a statute of this kind as relating to form of contract, not procedure, and should refer the question of form to the domestic rules of the law which governs the substance of the contract.

Robertson (*f*) criticizes the decision in *Leroux v. Brown* vigorously and effectively, but his theory of secondary characterization by the *lex causae* (*g*) involves the conclusion that the forum must acquiesce in the characterization of a foreign statute by the foreign law. If this theory were applied to the case of an action brought in X upon a contract made in Y, both being states of the United States, the Statute of Frauds of X being there characterized as substantive, and the Statute of Frauds of Y being there characterized as procedural, neither statute would be an obstacle to the bringing of the action (*h*). A more reasonable solution would seem to be that the court in X should by a process of assimilation decide that the statute of Y performs the same function as the statute of X and therefore characterize it as substantive within the meaning of the conflict rule of X by which the law of Y is indicated as the governing law (*i*).

Cook discusses the Statute of Frauds in chapters 6 and 8 of the *Logical and Legal Bases of the Conflict of Laws* (*j*). In the earlier chapter he mentions the Statute of Frauds in connection with his doctrine of the relativity or variability of the meaning of substance and procedure in the conflict of laws, that is, that these terms may mean one thing for some domestic purpose, and another thing for some other domestic purpose, and still another thing for some purposes of the conflict of laws (*k*). In the later chapter he mentions the three types of wording of

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(*f*) *Characterization in the Conflict of Laws* (1940) 253 ff.

(*g*) See chapter 6, § 1.

(*h*) See *Marie v. Garrison* (1883), 13 Abb. N.C. 210 (N.Y.), cited by Robertson, p. 256; *cf.* comment *b* on § 334 of the *Conflict of Laws Restatement*, and Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 226.

(*i*) *Cf.* Nussbaum, *Private International Law* (1943) 155. As to a similar problem in connection with statutes of limitation, see chapter 12, § 3.

(*j*) (1942) at pp. 150 ff., 170, (reproducing his article on "Substance" and "Procedure" in the *Conflict of Laws* (1933), 42 *Yale L.J.* 333), and at pp. 225 ff. (reproducing his article on "Characterization" in the *Conflict of Laws* (1941), 51 *Yale L.J.* 191).

(*k*) See chapter 13.

the statute adopted in various states of the United States, and submits that account must be taken not only of the precise wording of the statute in question in a particular case, but also of the construction which ought to be given to it for purposes of the conflict of laws as distinguished from some domestic purpose, and, furthermore, the way in which it should be construed for the purpose of the particular conflict rule in question in the case. The statute might therefore be characterized as substantive for the purpose of the particular conflict rule in question, notwithstanding that for some other purpose it may be characterized as procedural.

### § 5. Matrimonial Property and Succession.

Questions of characterization sometimes turn on the distinction between proprietary or contractual rights acquired by the parties to a marriage on the occasion of the marriage or as a result of the marriage and the rights of the surviving party on the death of the other party (*a*). If by virtue of an express marriage contract, or by virtue of a contract implied by the law of the matrimonial domicile (*b*) in the absence of an express contract, community of property is created, it would seem to be plain, on principle, that the fact that the parties subsequently change their domicile cannot have the effect of depriving either party of the proprietary or contractual rights already acquired by him or her as the result of the marriage. Those rights may of course be affected by subsequent transactions taking place in the country of the new domicile or valid under the law of that country, and if the husband predeceases his wife, the succession to his movables (that is, his half of the movables held in common with his wife) will be distributed in accordance with the law of his domicile at the time of his death, and his wife's property will continue to be her property (*c*).

Conversely, if the parties are married without making any marriage contract and are domiciled in a country by the law

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(a) See also chapter 22, § 2(4).

(b) "By the matrimonial domicile is to be understood that of the husband at the date of the marriage, with a possible exception in favour of any other which may be acquired immediately after the marriage, in pursuance of an agreement to that effect made before it." Westlake, *Private International Law*, § 36. The exception is doubted by Cheshire, *Private International Law* (2nd ed. 1938) 492, 493.

(c) Cf. *Beaudoin v. Trudel*, [1937] O.R. 1, [1937] 1 D.L.R. 216, in which the distinction was properly drawn between community of property and right of succession.

of which the spouses remain separate as to property in the absence of an express marriage contract (as in England or in the provinces of Canada other than Quebec), it would seem to be plain, on principle, that the fact that the parties subsequently become domiciled in another country cannot have the effect of creating community of property between them, so as to deprive either party of his or her proprietary or contractual rights existing immediately before the change of domicile (*d*).

In *DeNicols v. Curlier* (*e*), the question was whether the community of property between spouses resulting from their being domiciled in France at the time of their marriage, was affected by their subsequent acquisition of a domicile of choice in England. On the basis of the French law as proved to the English court the House of Lords held that the parties had made an implied contract creating community of property, and it followed that the property rights conferred by the contract were not affected by the subsequent change of domicile. It was argued that this decision was inconsistent with the earlier case of *Lashley v. Hog* (*f*), in which the facts were that two persons who were domiciled and married in England subsequently acquired a domicile of choice in Scotland, and remained domiciled there until the husband's death, and it was held that the Scottish doctrine of *communio bonorum* was applicable. It was pointed out in *DeNicols v. Curlier*, however, that the so-called *communio bonorum* of Scottish law was not a true community of property, and that a wife acquired thereunder not a proprietary interest, but only a hope of a certain mode of distribution of her husband's property on his death (*g*). The matter being characterized as a matter of the law of succession to movables, it followed that the wife's rights were governed by the law of the domicile of her husband at the time of his death (*h*). In each

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(*d*) Cf. *DeNicols v. Curlier*, [1900] A.C. 21 at p. 33, Lord Macnaghten, in accord with the *Boyer* case cited by him at p. 32, decided in the same way by the Cour de Cassation in France in 1854.

(*e*) [1900] A.C. 21. The case related to movables, but in *In re DeNicols*, *DeNicols v. Curlier*, [1900] 2 Ch. 410, the same principle was applied to immovables. See further discussion in chapter 22, § 2(4).

(*f*) (1804), 4 Paton 581.

(*g*) In Scottish law a widow is entitled to one-third of the movable estate of her husband (*jus relictæ*) and to a life rent of one-third of his immovable estate (*terce*), subject to modifications which are explained by J. C. G. (1942), 24 Jo. Comp. Leg. and Int. Law (3rd series) 68.

(*h*) So, in effect, Westlake, *Private International Law*, § 36a; cf. Foote, *Private International Law* (5th ed. 1935) 355. On the other

case the court characterized the provisions of the relevant law, and in accordance with its characterization applied, in the older case the *lex domicilii* of the testator at the time of his death, and in the latter case the *lex domicilii* of the husband at the time of the marriage.

The first example which Bartin (*i*) uses in his statement of the problem of characterization is the case of spouses who have their matrimonial domicile in Malta at the time of their marriage there without any marriage contract, and consequently by the law of Malta are subject to the system of community of property, and who subsequently become domiciled in France, where the husband acquires land and predeceases his wife. What are the widow's rights as regards the land? The answer would, on principle, seem to be obvious, namely, that if the community of property implied by the law of Malta includes land situated in other countries the community of property ought to be recognized in France as regards lands situated in France (*j*). It would follow that when the husband dies, his widow should be entitled in France to her own half share in the land, in addition to any interest that she might be entitled to in her husband's half share in the land under the French law of succession. It is difficult to see how any conflict of characterization arises. If French law, on the ground of local public policy or otherwise, refuses to recognize the validity of the community of property created by the law of Malta so far as land situated in France is concerned, the widow will in France not be entitled to any share in the land by virtue of the community of property, and will get only whatever share in the land the French law of succession gives her. This result is not, however, the consequence of any conflict of characterization, but is a consequence of the fact that in the lifetime of the husband the French

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hand, Dicey, *Conflict of Laws*, notes to his rule 186, and Cheshire, *Private International Law* (1938) 496, state a different view as to the distinction between *DeNicols v. Curlier* and *Lashley v. Hog*; and Baty, *Polarized Law* (1914) 101, in the course of an interesting discussion (98 ff.) of "conflicts of categories", characterizes Westlake's reasoning as "rather thin"; but it is submitted that Westlake's view is right.

(*i*) *Principes de Droit International Privé*, vol. 1 (1930) 221. Bartin's second example has been already discussed in § 3 of the present chapter, *supra*. As to the first example, cf. Neuner, *Der Sinn der Internationalprivatrechtlichen Norm* (1932) 60 ff.

(*j*) Cf. *In re DeNicols*, [1900] 2 Ch. 410, already cited, in which community of property created under the law of France was recognized in England as being operative with regard to land situated in England.

law refuses to recognize that she has a proprietary interest in the land acquired by her husband, and in that event it goes without saying that on her husband's death she takes only what the French law of succession gives her.

The question whether a rule of law that a will is revoked by the subsequent marriage of the testator (*k*) is a matter of testamentary law or a matter of matrimonial law has given rise to some difference of opinion. With regard to a will of movables, the case of *In re Martin* (*l*) was complicated by the fact that the English judges differed *inter se* as to the domicile of the *de cujus* at the time of her marriage and as to the materiality of her domicile at that time, as distinguished from her domicile at the time of her death. There was also not only a difference between the law of England and the law of France as to the effect of the marriage of a testator (an earlier will being revoked by English law, but not by French law), but the French view of domicile and the English view of domicile might lead to different opinions as to what was the domicile of the *de cujus* at the time of her marriage and at the time of her death, respectively (*m*). The three judges of the Court of Appeal characterized the English rule of law relating to the revocation of a will by the subsequent marriage of the testator as a matter of matrimonial law, governed by the law of the domicile at the time of the marriage and not by the law of the domicile at the time of death; Vaughan Williams and Rigby L.JJ. held that the domicile of the husband, and therefore the domicile of the testatrix, was in England at the time of the marriage, so that the will was revoked, in accordance with English law; but Lindley M.R., while agreeing that the material time was the time of the marriage, held that at that time the husband was domiciled in France, and therefore, in accordance with French law, the will was not revoked by the marriage, thus reaching

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(*k*) Expressed in the (English) Wills Act, 1837, s. 18, as modified by the Law of Property Act, 1925, s. 177; *cf.* R.S.O. 1937, c. 164, s. 20; and s. 14 of the uniform Wills Act prepared in 1929 by the Conference of Commissioners on Uniformity of Legislation in Canada.

(*l*) *In re Martin, Loustalan v. Loustalan*, [1900] P. 211. Rabel, *Conflict of Laws*, vol. 1 (1945) 375, considers that the reasoning "is unsound, and the decision ought to be overruled", citing my article (1937), 15 *Can. Bar Rev.* 227-230, reproduced here.

(*m*) This difference of views as to domicile is a conflict of characterization of nominally the same connecting factor, and gives rise to problems belonging to the second stage of the court's enquiry, the Selection of the Proper Law, discussed under that heading in chapter 5, § 2.

the same result as the trial judge, Jeune P., who had held that the rule was a matter of testamentary law, governed by the law of the domicile of the testatrix at the time of her death, namely, French law.

On the other hand the Conflict of Laws Restatement of the American Law Institute, § 307, says: "Whether an act claimed to be a revocation of a will of movables is effective to revoke it as a will of movables is determined by the law of the state in which the deceased was domiciled at the time of his death." And illustration 2 is as follows: "A, domiciled in State X, executes a will and marries. A dies domiciled in State Y. By the law of Y, a marriage revokes a previously executed will; by the law of X it does not. A dies intestate." The Restatement, § 250, says: "The effectiveness of an intended revocation of a will of an interest in land is determined by the law of the state where the land is." The comment is as follows: "Whether a will of an interest in land has been revoked, as for instance, by marriage or by the birth of a child, is determined by the law of the state where the land is." The two sections of the Restatement are consistent with each other in that they are both based on the implied characterization of a rule with regard to the revocation of a will by subsequent marriage as being a matter of testamentary law, not matrimonial law (*n*).

Whether the English doctrine of *In re Martin* (*o*), relating to a will of movables, would be applied by English courts to a will of land is not so clear. Dicey (*p*) expresses a cautious opinion that the applicability to a will of English land of the rule that marriage is a revocation thereof "may well depend upon the *lex situs*" (*q*), but "the matter is (*semble*) governed

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(*n*) Cf. Goodrich, Conflict of Laws (2nd ed. 1938) 438 (land), 450 (movables); 2 Beale, Conflict of Laws (1935) 972, 1037. As to movables, the case of *In re Coburn's Will* (1894), 30 N.Y. Supp. 383, 9 Misc. Rep. 437, is cited by Goodrich and Beale, and by Lorenzen, Cases on the Conflict of Laws (5th ed. 1946) 804, note 21. Lorenzen, citing *In re Kimberley's Estate* (1913), 32 S.D. 1, 141 N.W. 1081, and the Restatement, § 250, adds: "The situs governs, of course, as to realty". As to a will of land, Beale cites the same case *sub nom. Cornell v. Burr*.

(*o*) [1900] P. 211; followed in Scotland, *Westerman v. Schwab* (1905) 8 Sess. Cas. 5th series, 132, 13 Sc. L.T. 594, 43 Sc. L.R. 161, and in Ontario, *Seifert v. Seifert* (1914), 32 O.L.R. 433, 23 D.L.R. 440.

(*p*) Conflict of Laws (5th ed. 1932), notes to his rule 150. His discussion of the doctrine as to movables is to be found in the notes to his rule 197. As to movables, cf. Cheshire, Private International Law (2nd ed. 1938) 33, 523 ff.

(*q*) Citing *In re Caithness* (1891), 7 T.L.R. 354.

by the law to which husband and wife become subject at the time of the marriage," that is, the law of the matrimonial domicile (*r*). In *Re Howard* (*s*) Orde J. said that a will made by an unmarried Englishwoman "may perhaps not be rendered invalid," even as to her English land, by her subsequent marriage to a domiciled Scotsman, because in Scotland marriage does not invalidate a will. He cited the Scottish case of *Westerman v. Schwab* (*t*), and remarked that the case relates to movables, but that it is difficult to see why the principle should not be equally applicable to English land, especially if the opinion expressed by Lindley M.R. in *In re Martin* (*u*) that s. 18 of the Wills Act, 1837, does not apply to the wills of foreigners who die domiciled abroad, is sound.

It would not be difficult to imagine situations in which the divergence between the two modes of characterizing the rule (that is, as a rule of matrimonial law and as a rule of testamentary law respectively) would lead to irreconcilable conflict, as, for example, if a testator changed his domicile between his marriage and his death from England to France, and left movable and immovables in England and in New York. A will made before his marriage would be revoked as to the English movables, but not as to the New York movables. As to the English movables, the will would be revoked on the basis of either matrimonial law or testamentary law. The fate of the New York immovables would depend solely upon the New York law of succession, without regard to the domicile of the testator at the time of his marriage. It is not clear, moreover, that the purpose of the rule is more effectually accomplished by the English theory, namely, that, so to speak, the testamentary slate is wiped clean as from the time of the marriage, if the proper law applicable at that time says so, than it is by the Restatement theory, namely, that the pre-nuptial will is to be disregarded if the proper law of succession applicable at the time of the testator's death says so. At least one of the exceptions to the rule with regard to revocation of a will by subsequent mar-

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(*r*) Citing *In re Martin*, [1900] P. 211 at p. 340, Vaughan Williams L.J.

(*s*) (1923), 54 O.L.R. 109, at p. 119, [1924] 1 D.L.R. 1062, at p. 1071.

(*t*) See note (*o*), *supra*.

(*u*) [1900] P. 211, at p. 233.

riage, as stated in the Ontario Wills Act (v), would appear to be based on the theory that the rule is a matter of testamentary law.

An example of independent, though probably unconscious, characterization in accordance with the *lex fori* in the light of full information as to the effect of a foreign law is afforded by the Saskatchewan case of *In re Jutras Estate* (w). A man domiciled in the province of Saskatchewan and a woman domiciled in the province of Quebec were married in Quebec, and thereafter lived together in Saskatchewan until the husband died there intestate. Before the marriage they entered into a marriage contract in Quebec notarial form providing that the parties should be separate as to property. To this extent it was clear that, if the matrimonial domicile had been in Quebec, the contract would have been effective to negative the community of property which would have resulted from their marriage without an express marriage contract. The matrimonial domicile being in Saskatchewan, an express contract for separation as to property was unnecessary. The contract also contained a paragraph by which the parties made and accepted each to the other for the benefit of the survivor of them, a mutual, equal and reciprocal donation of the property movable and immovable of whatsoever nature belonging to the first of them to die for the benefit of the survivor, to deal with and dispose of in absolute ownership after the death of the predeceased consort. The question which arose in a Saskatchewan court was whether this paragraph of the contract was effective as to property situated in Saskatchewan, so as to prevail against the provisions of the Saskatchewan Intestate Succession Act, under the terms of which the widow would be entitled to one-third of the property and the children to two-thirds. The answer to the main question depended on whether the paragraph should be characterized as (a) a will, (b) a conveyance or transfer *inter vivos*, to take effect on death, or (c) a contract to leave property by will, by each party in favour of the other. If read by the light of nature the paragraph would appear to be purely testamentary in character, but in that event the proper law would be the law of Saskatchewan, the *lex domicilii* as to movables and the *lex rei sitae* as to land. If read as construed by a Quebec advocate

(v) R.S.O. 1937, c. 164, s. 20(1), clause b: "where the wife or husband of the testator (*sic*) elects to take under the will, by an instrument in writing", etc.

(w) [1932] 2 W.W.R. 533.

the paragraph was an irrevocable donation or disposition in favour of the survivor of all the property belonging to the other consort at the time of his death, but in that event the proper law would again be the law of Saskatchewan (the *lex rei sitae*). Without considering these two possible ways of characterizing the transaction and the difficulties which either of them would raise, the court characterized the transaction as a contract, governed by the law of Quebec, valid by that law and therefore valid in Saskatchewan. The court did not say in terms that the particular paragraph was a contract for valuable consideration to leave property by will, but unless it is so regarded, it would seem to be difficult to support the decision.

### § 6. Administration and Succession (x).

The distinction between administration of the estate of a deceased person, governed by the domestic *lex fori* (that is, the *lex situs* of the assets comprised in the local administration), and succession to his property, governed by the *lex domicilii* or the *lex rei sitae*, according to the nature of the subject matter (a), may give rise to questions of characterization (b) in the border land where administration ends and succession begins (c). The application of the *lex fori* to the proof of creditors' claims and the refusal to pay the surplus to the domiciliary administrator may come perilously close to defeating the proper law governing succession (d). It would appear that statutes which enable a court to give to a testator's dependants a larger share of his estate than he has given them by his will are generally to be construed as statutes relating to succession, analogous to limitations on a testator's disposing power (e). Statutory enactments providing that life insurance money shall not be available for the payment of creditors' claims may be characterized in various ways in the light of their context. They may relate merely to payment of creditors' claims in administration, or they may

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(x) The following brief statement, reproduced from (1937), 53 L.Q.R. 542, is sufficient in this place, because the distinction between administration and succession will be fully discussed in chapter 22 and other chapters. For the same reason the somewhat more detailed statement in (1937), 15 Can. Bar Rev. 231-233, is omitted.

(a) See chapters 22 and 32.

(b) See especially chapter 22.

(c) See chapter 33.

(d) *In re Lorillard, Griffiths v. Catforth* [1922] 2 Ch. 638, 13 Brit. R.C. 560, in chapter 35.

(e) See chapter 36.

relate to succession, or as the case may be, and the selection of the proper law will depend upon the mode in which they are characterized (f).

### § 7. Property, Contract and Conveyance\*

With particular reference to land it has been customary in the conflict of laws to draw the distinction between the conveyance or transfer of the property in land or some interest in land, governed by the *lex rei sitae*, and contractual or equitable rights with respect to land, which may be governed by some other law. The substance of the distinction tends to be reduced to a shadow, however, when the concept of interest in land within the rule that the creation and transfer of an interest in land is governed by the *lex rei sitae* is extended so as to include equitable interests and other interests outside of the scope of the property in land in the strict common law sense. From another point of view the reality of the distinction tends to become doubtful in the light of the theory that the property in land, either in the legal sense or in the equitable sense, is merely a bundle of rights, privileges, powers and immunities which a person has with respect to land, and that these terms are merely descriptive of the beneficial aspects of various legal relations existing between him and other persons, and consequently there is no logical line of demarcation between a personal right with respect to a thing (*jus ad rem*) and a real or proprietary right (*jus in re, jus in rem*) (g).

Similar observations may be appropriate to some extent to movables (h) and to intangibles (i).

The net result would seem to be that in the conflict of laws the selection of the proper law has traditionally been made on the basis of a distinction that has no substantial or real existence. The truth may be, however, that there are sound reasons for applying the *lex rei sitae* to some legal relations with respect to things and some other law to other legal relations with respect

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(f) See chapter 35.

\*This section reproduces in an abbreviated and substantially rewritten form the sections bearing the same title, published (1937), 53 Law Quarterly Review 543-544, and 15 Canadian Bar Review 240.

(g) As to the whole of the foregoing paragraph, see chapter 30, §§ 2 and 3.

(h) See chapter 19.

(i) See chapter 20.

to things, and that the alleged distinction between proprietary interests and personal rights is a traditional mode of expression that seems to support conflict rules which are in fact based on social convenience or practical expediency. In case of conflict between the *lex rei sitae* and some other law, the latter must, however, yield to the former.

If it is assumed, in accordance with the traditional language of the conflict of laws that there is some substance or reality in the distinction between proprietary interests and personal rights, the problem of characterization in connection with proprietary interests presents some special features. We have seen that, as a general rule, the legal question arising from a factual situation should be characterized by a court in accordance with the *lex fori*, including the characterization of any provision of a foreign law, in its context in the foreign law, if that law may be the proper law under the conflict rules of the forum (*j*). On the other hand, if a person claims to be entitled to a proprietary interest in a thing, it would seem to follow from the rule that questions of proprietary interests in things are governed by the *lex rei sitae* that the question before the court must be characterized in accordance with that law, including the preliminary or incidental question whether the thing in which the interest is claimed is land or some other thing.

Cases relating to land afford the clearest examples (*k*) and those relating to intangibles (*l*) the most doubtful examples, of the applicability of the *lex rei sitae*. Cases relating to movables occupy an intermediate position, because while the situs of a chattel at a given time is a pure question of fact, the situs may be changed from time to time (*m*).

So far as the view stated above is right, namely, that a question relating to proprietary interests in things should be characterized in accordance with the *lex rei sitae*, certain important consequences logically follow, chiefly in connection with the application of the proper law, so that, for example, the title to a thing situated in a foreign country must be decided as it would be decided by a court of the situs (*n*).

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(*j*) See §§ 1 ff. of the present chapter, *supra*.

(*k*) See chapters 22 and 30.

(*l*) See chapter 20.

(*m*) See chapter 19.

(*n*) See chapter 22, § 2(8).

## § 8. Status, Capacity and Incidents of Status.

Some confusion has been caused in the conflict of laws by the failure to distinguish between status and the incidents of status and between status and capacity (*a*); and it would seem that this confusion may, at least to some extent, be avoided by an exact characterization of the question or questions in issue in any particular situation.

It being assumed that by English conflict of laws status is, as a general rule, governed by the *lex domicilii*, the existence of the status which a person has by that law should be recognized everywhere, even in a country in which there is no similar status recognized by the domestic law. It does not follow, however, that all or any of the incidents which attach to a particular status in the country of the domicile will be recognized elsewhere, or that the *lex domicilii* which creates the status is also the governing law as to the capacity of a person who has that status (*b*).

For example, the question whether a person is a minor or is of age resolves itself into the question whether he has reached the age of majority under the law of his domicile (that is, his domicile of origin, or, if the domicile of his father, or in the case of an illegitimate child, his mother, has changed during his minority, then the latest domicile imposed upon him during minority). If by that law he is of age, he should not be considered a minor elsewhere, even if he acquires a domicile of choice in a country by the law of which the age of majority is fixed at an age which he has not reached. Conversely if he is still a minor by the law of his own domicile, he should be regarded as a minor elsewhere. But it does not follow that in a country other than that of his domicile a minor would be subject to the *patria potestas* as defined by the *lex domicilii* or that a guardian appointed in the country of the domicile could exercise elsewhere the powers conferred by the *lex domicilii*

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(*a*) See, especially, Allen, Status and Capacity (1930), 46 L.Q. Rev. 277 at pp. 293 ff.; cf. 2 Beale, Conflict of Laws (1935) 649 ff. 660; Robertson, Characterization in the Conflict of Laws (1940) 145; Taintor, Legitimation, Legitimacy and Recognition in the Conflict of Laws (1940) 18 Can. Bar Rev. 589, at pp. 591-592, 691-692; and chapter 39, *infra*.

(*b*) The distinction between recognizing the existence of a status created by the *lex domicilii* and giving effect to the results of that status in accordance with the *lex domicilii* is recognized in Dicey's rule 138, whereas there is some confusion between status and capacity in the notes to his rule 136; cf. Allen, 46 L.Q. Rev. 277, at 297, 306.

(c). Similarly, the recognition of the status of a minor under the law of his foreign domicile does not involve the consequence that effect should be given to his capacity or incapacity elsewhere. At least if he buys goods or makes a commercial contract in England or in any of the common law provinces of Canada (d) his capacity to contract, or his obligation in quasi-contract to pay the value of goods supplied, or as the case may be, will probably be governed, not by the law of his domicile, but by the law of the place of contracting or by the proper law of the contract (e).

Again, when legitimation by subsequent marriage was not recognized by the domestic law of England (or Ontario), a person who was legitimated by the subsequent marriage of his parents in accordance with the *lex domicilii* of his father was legitimate in England or Ontario, as the case might be, and nevertheless this person was incapable of inheriting English (or Ontario) realty, not of course because he was illegitimate, for his status as a legitimate person was recognized, but because the English (and Ontario) law of succession to realty on intestacy required that the heir should have been born in lawful wedlock (f). In other words, legitimacy is a matter of status, governed by the *lex domicilii*, and capacity to inherit realty is a matter of succession to land, governed by the *lex rei sitae*. The provision of the Legitimacy Act, 1926, by which the principle of legitimation by subsequent marriage was adopted in the domestic law of England, does not of course affect the validity of the distinction between status and capacity to inherit realty (g), but it would appear that the incapacity of a legitimated person to inherit has been practically abrogated in domes-

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(c) Cf. *Woodworth v. Spring* (1862), 4 Allen (Mass.) 321.

(d) *Secus*, apparently, in Quebec, where status and capacity alike are governed by the *lex domicilii*: C.C. article 6; Johnson, *Conflict of Laws*, vol. 1 (1933) 180 ff. No distinction is made between commercial and other contracts: *Jones v. Dickinson* (1895), Q.R. 7 S.C. 313, cited by Johnson, *op. cit.*, vol. 3 (1937) 408. As to status and capacity in Quebec conflict of laws, see also *Lister v. McNulty*, note (p), *infra*.

(e) As to capacity to make a commercial contract, see chapter 14, § 9.

(f) *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895, 5 R.C. 748. There was no similar incapacity to take realty under a devise to a child (*In re Grey's Trusts* [1892] 3 Ch. 88), or to take a leasehold or other personal interest in land, either on intestacy or under a bequest (*In re Goodman's Trusts* (1881), 17 Ch. D. 266; *In re Andros* (1883), 24 Ch. D. 637).

(g) As to which, see also chapter 22, § 2(4).

tic English law by the Law of Property Act, 1925 (*h*). Already, before the domestic law of England was changed by the Legitimacy Act, 1926, legitimation by subsequent marriage had been by provincial statutes adopted in the common law provinces of Canada, in conformity with the already existing law of Quebec. Long before that time legitimation of a child by the subsequent marriage of his parents under the domiciliary law of his father had been recognized by the conflict rule of the laws of England and of all the provinces of Canada. The English law and the Ontario law with respect to legitimation by subsequent marriage are further discussed in a later chapter (*i*).

The cases of the minor and of the legitimated child above stated are examples of the principle that a question of status and a question of capacity are distinct questions. Capacity in the abstract has, so to speak, no existence, and capacity cannot be characterized without regard to the transaction of which it is a part. We must speak rather of capacity to marry (characterized as a matter of intrinsic validity of marriage), of capacity to succeed to property (characterized as a matter of succession), capacity to make an ordinary commercial contract (characterized as a matter of intrinsic validity of contract), capacity to make a marriage contract or settlement (characterized as a matter of intrinsic validity either of contract or of conveyance), and so on (*j*).

Again, in further illustration of the distinction between status and the incidents or consequences of status, it would seem that persons domiciled in a country in which polygamy is recognised by law may in that country enter into a valid polygamous or potentially polygamous relation and acquire the valid status of parties to that relation, and that the existence of that relation and of that status should be recognized in another country by the domestic law of which polygamy is not recognized. It does not follow, however, that in the latter country the relation is to be regarded as identical with "marriage" or that effect will be given there to all the incidents or consequences which attach to the relation and status in the country of domicile, although there would seem to be no good reason why the status

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(*h*) Cf. note (1927), 43 L.Q. Rev. 22; Cheshire, *Private International Law* (2nd ed. 1938) 393-394.

(*i*) See chapter 39, including a discussion of adoption of children, and legitimation of an illegitimate child by adoption, and of the distinction between status and the consequences or incidents of status.

(*j*) See chapter 31, § 2, for further discussion and cross-references.

of a child of a polygamous union and his right of succession to movables under the law of his parents' domicile should not be recognized in a country other than that of the domicile (*k*).

Characterization of a question on the basis of the distinction between status on the one hand and capacity or incident of status on the other hand may be helpful in the solution of a problem of the conflict of laws as regards the scope of the reference to a foreign law by a conflict rule of the law of the forum. For example, if the question is whether a given person is a legitimate son, the court should decide the question as it would be decided by a court of the foreign domicile, that is, in accordance with the conflict rules of the law of the domicile (*l*), whereas if the question is whether a person who is legitimate under the law of the foreign domicile is entitled to claim any rights, privileges, powers and immunities by virtue of his status, the court will decide the question in accordance with the conflict rules of law of the forum and the policy of the law of the forum without necessarily deciding the question as it would be decided by a court of the domicile.

If the sole question before the court is one of succession to movables, that question should, as a general rule, be decided in accordance with the domestic *lex domicilii* designated by the conflict rule of the forum, without regard to the corresponding conflict rule of the law of the domicile (*m*). The same case may, however, involve both a question of succession to movables and a question of status, and these questions must be separately considered. For example, the court must decide by its own conflict rules what classes of persons are entitled to succeed to the property. If by those rules the children of the *de cujus* are entitled to take in equal shares, it is immaterial that the conflict rules of the domicile define the beneficiaries in some different way. Next arises the question who are the children of the *de cujus*, and this may be a pure question of status. If, for example, a person claims to be one of the children by virtue of his legitimation under the *lex domicilii* of his father, the question of his legitimacy is a question of status, to be

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(*k*) See chapter 40, § 13; cf. Johnson, *Conflict of Laws*, vol. 1 (1933) 190, 302 ff., 309 ff., for discussion with special reference to the law of Quebec.

(*l*) See chapter 7, § 7(2)(3).

(*m*) See chapter 7, §§ 6(4)(5), and chapters 8 and 9.

decided by the forum as it would be decided by a court of the domicile (*n*).

*Lucas v. Coupal* (*o*), was an action brought in Ontario by four infants (minors), all domiciled in Quebec, suing by their mother, also domiciled in Quebec, as their next friend, to recover damages resulting from an accident which occurred in Quebec. The mother also sued on her own behalf and as regards her personal claim obtained judgment. The claim of the infant plaintiffs involved, however, the distinction between status and procedure, and as regards them the action was dismissed. An infant under the law of Ontario may bring an action in his own name, and if he succeeds the judgment is in his favour and its fruits are his. In order to protect the defendant in the matter of costs the infant must have associated with him an adult as his next friend, but the next friend is not a party to the action. His intervention is a mere matter of procedure, and no interest in the infant's cause of action or in the fruits of the action is at any time vested in him. On the other hand a minor under the law of Quebec is not entitled to sue in his own name. An action must be brought in the name of a tutor duly appointed, the minor is not a party, and the fruits of the action are payable to the tutor who holds them in his own name until the minor attains majority. In the present case it followed that there was no cause of action vested in the infant plaintiffs. They lacked the status entitling them to bring an action, and therefore could not avail themselves of the procedural rules of the law of the forum applicable only to infants who under Ontario law might sue in their own name.

The case of *Lister v. McNulty* (*p*), is of especial interest because it involved a discussion of article 6 of the Civil Code of Lower Canada, which provides in effect that the "status and capacity" of a person are governed by the law of his domicile. This linking together of status and capacity as being governed by a single law was imported into Quebec from France, since article 3 of the French Civil Code also provides in effect that the status and capacity of a person are governed by a single law,

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(*n*) See chapter 7, § 7(2)(3).

(*o*) (1930), 66 O.L.R. 141, [1931] 1 D.L.R. 391, Orde J.A., after trial without a jury.

(*p*) [1944] S.C.R. 317, [1944] 3 D.L.R. 673, in the Supreme Court of Canada, on appeal from the province of Quebec.

that is, his national law (*q*). So far as the Quebec system of conflict of laws makes applicable the law of the domicile to capacity as well as status, that system is inconsistent with the main thesis of the present § 8 that questions of capacity must be distinguished from questions of the existence of a status in English and Ontario conflict of laws. As the action in *Lister v. McNulty* was brought in Quebec, and therefore, on appeal to the Supreme Court of Canada, Quebec rules of the conflict of laws had to be applied, the decision as to the scope of "status and capacity" in Quebec conflict of laws would not be applicable *in toto* to an action in a province or country in which English conflict rules prevail, but it is probable that the decision turned upon the scope of status rather than that of capacity, and therefore that the principle of the decision would apply to an action in Ontario if comparable differences between the domestic laws of Ontario and the country of domicile existed. The action in Quebec was brought by a man with respect to damages resulting from injuries sustained by his wife in an accident which occurred in Quebec. The plaintiff and his wife were domiciled in Massachusetts, and the majority of the Supreme Court of Canada declined to allow the plaintiff damages for the loss of his wife's services and companionship in accordance with domestic Quebec law because his claim was not one conferred by domestic Massachusetts law. The decision involved of course the characterization in Quebec of the provision of the relevant Quebec conflict rule, and there is no logical or inherent reason why the Quebec characterization of a provision as to "status and capacity" should be identical with the Massachusetts characterization of a similar provision of Massachusetts law, however desirable it may be that words used in the conflict rules of different countries should be characterized on some common or universal principle (*r*). The case did not involve

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(*q*) In France "capacity" in article 3 is construed as being limited to personal capacity, and as not being applicable to a question of a testator's disposing power under the law of his domicile. See chapter 7, §§ 3 and 4.

(*r*) Hancock, A Problem in Damages in the Conflict of Laws (1944), 22 Can. Bar Rev. 843, ably analyzes the judgments of the members of the Supreme Court in *Lister v. McNulty*, but at p. 846, note 4, he imagines some "conceptualistic monsters" which are pure inventions of his own, because he seems to think that the characterization of "status" in a Quebec conflict rule must be identical with the characterization of "status" in a Massachusetts conflict rule, although in the text of his article he seems to recognize that the question was a question of the social policy of the Quebec conflict rule and what the court believed to be convenient and just.

any question as to the measure of damages in an action brought in Quebec in respect of an alleged tort committed elsewhere, but one of the dissenting judges in the Supreme Court (Hudson J.) cited *Machado v. Fontes* (s) for the proposition that damages in tort are procedural, governed by the domestic rules of the law of the forum, without regard to the law of the place of the commission of the alleged tort, and that consequently in an action brought in Quebec in respect of an alleged tort committed in Quebec the damages are governed by the domestic law of Quebec. Apart from the question whether the citation of *Machado v. Fontes* is relevant to the situation existing in *Lister v. McAnulty*, it is submitted in other chapters that *Machado v. Fontes* does not support the proposition that damages in tort are procedural (t), and that the case, notwithstanding some adverse criticism (u), is quite defensible (v).

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(s) [1897] 2 Q.B. 231.

(t) See chapter 2, at p. 19, *supra*, and chapter 45.

(u) See chapter 45.

(v) See chapter 2, at p. 18, *supra*, and chapter 45.

## CHAPTER V.

### SELECTION AND APPLICATION OF THE PROPER LAW\*

#### I. Selection of the proper law.

§ 1. The connecting factor, p. 86.

§ 2. Characterization of the connecting factor, p. 90.

#### II. Application of the proper law.

§ 3. The proper law and the factual situation, p. 94.

§ 4. Patent conflict of connecting factors, p. 96.

### INTRODUCTORY NOTE

In chapter 3 it was suggested that the court's enquiry in a conflict of laws case should be divided into three stages, (1) the characterization of the question, (2) the selection of the proper law and (3) the application of the proper law, and in chapter 4 the characterization of various classes of questions was discussed.

#### I. SELECTION OF THE PROPER LAW.

##### § 1. The Connecting Factor.

When the question has been characterized, the enquiry enters its second stage, and the proper law must be selected. The process of selection of the proper law is logically subdivided into two sub-stages. The selection involves (a) the formulation or selection of a rule of the conflict of laws as to the proper law to be applied as, for example, that the *lex domicilii*, the *lex loci celebrationis*, the *lex rei sitæ*, or as the case may be, is the governing law, and (b) the application of the abstract or general rule so formulated or selected to the facts of the case and the consequent concrete or specific designation of the law of a particular country as the proper law.

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\*This chapter reproduces the final portion of an article, entitled *Characterization in the Conflict of Laws*, published (1937), 53 *Law Quarterly Review* 547-567, but the material contained in the original article has been substantially abbreviated as regards matters discussed in other chapters.

The two sub-stages in the process of selection, above stated, may be put in different words, and perhaps may be restated with greater precision, if we say that the selection of the proper law involves (a) the selection of the connecting factor, that is, the place element in the factual situation which is indicated by the conflict rules of the forum as the dominant element for the purpose of the selection of the proper law, and (b) the consequent selection of the law of the country in which that element is situated. The selection of the appropriate connecting factor is equivalent to the selection or formulation of the specific conflict rule of the forum appropriate to the question as already characterized.

Usually the selection of the connecting factor is free from difficulty, because there is usually available for use a settled conflict rule applicable to a given type of question. For example, if the question is characterized as one of succession to movables, the selection of the domicile of the *de cujus* at the time of his death as the appropriate connecting factor follows usually as a matter of course; but it may be a matter of some nicety whether a given question should be characterized as one of succession (a). Not infrequently, in other cases also, the selection of the appropriate connecting factor resolves itself on analysis into a matter of characterization of the question, so that an accurate characterization of the question results in the application of an existing conflict rule. Occasionally there is doubt as to the selection of the connecting factor because of the unsettled state of the conflict rules of the forum, that is, because an appropriate conflict rule has not hitherto been formulated. It may be the duty of a court to formulate a new conflict rule, and in performing this duty the court should consider existing rules relating to analogous questions as well as solutions reached in other countries, with the view of assisting in the construction of a reasonable system of conflict of laws.

While the situation which is to be connected with some particular system of law, or, in other words, to which the selected proper law is to be applied, is purely factual (b) the connecting factor itself may not be purely factual, but may be a juridical concept of the *lex fori* or a legal conclusion resulting from the application of the *lex fori* to the purely factual elements of the situation (c),

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(a) See chapter 4, § 6, with cross-references there given.

(b) See chapter 3, § 2.

Savigny in volume 8 of his *System des Heutigen Römischen Rechts*, published in 1849 (*d*), having in §§ 345 ff. reached the conclusion that in modern law domicile (*Wohnsitz*) in a particular territory is the legal principle from which to deduce the subordination of a person to a particular local law, or the tie which connects a person with a particular territory—'a conclusion inevitable to one who approached the subject as an expositor of Roman law from which *origo* had dropped out' (*e*)—then directed his attention to establishing a similar connection between legal relations (*f*) and a particular territory. His fundamental formula, stated in § 360, is that in order to resolve a question of conflict of laws it is necessary "to discover for every legal relation that legal territory to which, in its proper nature, it belongs or is subject, or in which it has its seat (*Sitz*)".

Westlake observes (*g*):

This was equivalent to entrusting the selection of the rule in the case of each legal relation to an appreciation of what justice and convenience require, for nothing is gained by interposing a seat of the relation which in its turn justice and convenience must point out. Apart, therefore, from the value of his judgment in discussing particular questions, Savigny's chief contribution to our subject lay in directing attention to the substantial nature of each legal situation to be dealt with rather than to the sovereignty over persons and places, and in the check which he thereby gave to the exaggerated application of the *lex situs* which had set in with d'Argentré. The spirit of this teaching has not ceased to operate, though sovereignty at present bulks so largely in the view of writers on our subject that few carry it out without referring to that consideration.

Thus, Westlake, while acknowledging the beneficial influence of Savigny, seems to have discouraged the use in English con-

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(c) *E.g.*, domicile of a person, place of making of a contract, situs of an intangible thing (see § 2, *infra*).

(d) Translated into English by W. Guthrie and published at Edinburgh (1st ed. 1869, 2nd ed. 1880), under the title *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in respect of Place and Time*.

(e) Westlake, *Private International Law*, Introduction. For the purpose of the present statement of Savigny's theory, it is immaterial that *Wohnsitz* may not be exactly equivalent to domicile in the English sense.

(f) Including in that term (1) status (*Zustand*) of a person (capacity for rights and capacity to act), (2) law of things, (3) law of obligations, (4) succession, and (5) family law (marriage, paternal power, guardianship). As has been pointed out in chapter 3, § 2, it would be more accurate to speak of a factual situation rather than a legal relation, as being connected with a particular territory or system of law.

(g) *Op. cit.*, Introduction.

flict of laws of Savigny's concept of a connecting factor, whereas it would seem that this concept is a useful, if not essential, element in an exact analysis of the process of selection of the proper law.

Savigny then, in § 361, sets out a list of the relations of fact which may come into consideration in determining the particular territorial law which must be applied in case of collision between different laws and among which a choice will always be made when the seat of a particular legal relation has to be fixed, namely, (1) the domicile of any person concerned in the legal relation, (2) the place where a thing which is the object of the legal relation is situated, (3) the place of a juridical act which has been or is to be done, and (4) the place of the tribunal which has to decide a law suit. A given 'relation of fact' is, in other words, the connecting factor between the legal relation and a particular country.

While modern writers of continental Europe express widely divergent views as to the principles which should govern the selection of the connecting factors in different classes of cases, many of them are in agreement in adopting in effect Savigny's system in so far as they state the selection of the proper law to be dependent upon the selection of the connecting factor appropriate to the nature of the question. The connecting factor or link between the factual situation and a particular country is variously expressed in German as the *Anknüpfung*, *Anknüpfungsbegriff*, *Anknüpfungsmoment*, *staatliche Beziehung*, *Kriterium*, etc., in French as the *point d'attache*, *point de contact*, *circonstance de rattachement*, *principe de rattachement*, *élément de rattachement*, etc., and in Italian as the *criterio di collegamento*, *momento di collegamento*, *richiamo*, *ricollegamento*, etc.

Raape (*h*) introduces his discussion of the *Anknüpfung* with a picturesque figure of speech. Private international law is a system of connecting factors. A factual situation is to be connected with a particular system of law. Rules of conflict of laws are bridges and the legislator who lays down the rules is the *pontifex*. Some element in the factual situation must be used as a bridge, and this element may be a person, a thing or an act done or to be done. A distinction must, however, be made. The thing or the act is necessarily localized (the thing where

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(*h*) Internationales Privatrecht, in vol. 6 of Staudingers Kommentar (1931) 4, 5.

it is situated, and the act where it is done or to be done), and therefore a thing or an act serves not only as a point of commencement, but also as the bridge, connecting the situation with a particular country, whereas a person may be connected with a particular country by his nationality, by his domicile, by his residence or by his mere presence, and the person serves only as a point of commencement, and a further element must be used to complete the span of the bridge. In other words the situs of a thing or the place of doing of an act may be a sufficient connecting factor, but in the case of a person, a further selection must be made between his nationality, domicile, residence and presence in order to have a connecting factor. In Raape's language, the thing or the act is not merely the *Anknüpfungspunkt*, but also the *Anknüpfungsmittel*, whereas a person is merely the *anknüpfungspunkt*, and his nationality, domicile, etc., is the *anknüpfungsmittel*.

## § 2. Characterization of the Connecting Factor.

As already pointed out a conflict of conflict rules may arise in any of three different ways (*i*). If in two given countries the conflict rules are on their face the same in terms in that the same connecting factors are specified with respect to particular questions of conflict of laws respectively, but in a given factual situation the question before the court is characterized in one way in one country and in another way in the other country, there may be a latent conflict of conflict rules, and the difference in the characterization of the question may result in the use of different connecting factors and consequently the selection of different proper laws as applied to the same factual situation (*j*).

If on the other hand different connecting factors are specified in the corresponding conflict rules of two countries with respect to the same type of question, there may be a patent conflict of conflict rules applied to the same factual situation, notwithstanding that the question before the court is characterized in the same way in both countries (*k*).

The intermediate kind of case now requiring discussion is that in which the conflict rules of two countries are in terms the same in that they use nominally the same connecting fac-

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(*i*) See chapter 3, § 1.

(*j*) Discussed in chapter 4.

(*k*) To be discussed in § 4, *infra*.

tor with respect to a question which is characterized in the same way in both countries, and nevertheless there may be a latent conflict of conflict rules, because the place element specified as the appropriate connecting factor in the conflict rule of one country may be characterized differently from the place element specified in the corresponding conflict rule of the other country (1).

The commonest example of conflict of characterization of the connecting factor is a conflict as to the concept of domicile. The question before the court may be characterized in each of two countries as a matter of succession to movables, and the conflict rule of each country may say that the connecting factor for the purpose of succession to movables is the domicile of the *de cuius* at the time of his death, and nevertheless the conflict rules of the two countries may be different in effect because domicile is used in one sense in one country and in another sense in the other country.

On principle it would seem to be clear that the connecting factor specified in a conflict rule of the forum must be defined by the *lex fori* (m). In the characterization of the question before the court, that is, in order to ascertain whether the question is one which calls for the application of a given conflict rule, the court must necessarily consult in their context the provisions of a foreign law if a question arising under that law has to be characterized, but even then the question must as a general rule be characterized in accordance with the *lex fori* (n). On the other hand, when the question has been characterized, and the court has consequently decided that a given conflict rule of the forum is applicable, and has therefore selected a particular place element as the appropriate connecting factor, there can be no reason for consulting any foreign law as to the meaning of that factor. The choice of the connecting factor is of the essence of the system of conflict of laws of the forum, and if in that system a particular place element is regarded as the dominant one with regard to the question as characterized by the court, it is essential, in order to give effect to the conflict rule of the forum, that the connecting factor specified in that rule should bear the meaning assigned

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(1) Kahn's second class of *Gesetzeskollisionen*: chapter 2, § 1.

(m) Having regard, however, to the fact that the definition is for the purpose of a conflict rule. For other purposes the same place element may have a different meaning.

(n) See chapter 4, § 2.

to it by the *lex fori* and not the meaning assigned to it by some foreign law. The English cases have decided that a reference to domicile in an English conflict rule means domicile in the English sense, without regard to the law of the country of domicile, that is, notwithstanding that under the law of that country the *de cuius* is not considered to be domiciled there (o).

It happens that in some of the English cases in which the *renvoi* has been discussed, the difference between the conflict rules of England and some other country consisted solely in a difference of view as to the domicile of the *de cuius* at the time of his death. This was so in *Collier v. Rivaz* (p). The *de cuius* was domiciled in Belgium according to English law, but, by reason of his not having obtained the authorization of the Belgian government to reside in Belgium, he was not domiciled in Belgium according to Belgian law. Similarly, in *In re Annesley* (q) the testatrix was domiciled in France in the English sense, but, by reason of article 13 of the French Civil Code, was domiciled in England in the French sense, at least for the purpose of succession to movables. In the judgment it was stated that the relevant French conflict rule was that succession to movables was governed by the national law of the *de cuius*, that is, as if the case were a case of patent conflict of conflict rules (r), whereas succession to movables is governed in French conflict of laws by the law of the last domicile of the *de cuius* (s), and the precise question arising for decision was whether the testatrix had unlimited disposing power according to English law or a limited disposing power according to French law, clearly a question of succession to movables. The case was therefore a perfect example of verbally

139 (o) See especially *In re Annesley*, [1926] Ch. 692, and the cases there cited of *Bremer v. Freeman* (1857), 10 Moore P.C. 306, and *In re Martin*, [1900] P. 211. The case of *In re Johnson*, [1903] 1 Ch. 821, to the contrary, must be disregarded. Cf. chapter 7, § 6(2) (b), § 6(4) (b) (d). In many countries, other than Anglo-American countries, nationality not domicile is the connecting factor with regard to the personal law, and it appears to be a settled rule that the question whether a person is a national of a given country is determined exclusively by the law of that country: Rabel, *Conflict of Laws*, vol. 1 (1945) 136.

(p) (1841), 2 Curt. 855: see chapter 7, § 6(2) (a), chapter 8, § 6, and chapter 9, § 5.

(q) [1926] Ch. 682: see chapter 7, § 6(4) (d).

(r) See § 4 of the present chapter, *infra*.

(s) See chapter 7, § 4.

identical rules of the conflict of laws existing in two countries, the last domicile of the testatrix being the connecting factor specified in the conflict rule of each country, but domicile being characterized in one way in one country and in another way in the other country.

Some other English cases relating to the *renvoi* involve, not a latent conflict of conflict rules or a latent conflict of connecting factors, but a patent conflict of conflict rules. Such cases turn upon considerations somewhat different from those governing the cases cited above, and they will be appropriately mentioned in connection with the problem of the application of the proper law (*t*).

Of the place elements, other than domicile, which are frequently used in English conflict of laws as connecting factors for particular purposes, only two may be, briefly, mentioned here by way of examples, namely, the place of making of a contract and the situs of a thing. Each of these connecting factors may give rise to latent conflicts of conflict rules by reason of the divergent characterization of the factors themselves.

The place of making of a contract or place of contracting is more or less widely used as the connecting factor for various purposes in various systems of conflict of laws. Even in the Anglo-American legal world opinions differ as to the extent to which it should be so used. Furthermore, even if the conflict rules of two countries are in nominal agreement in referring a given question to the law of the place of making, these rules may differ in substance because the place of making is characterized differently in the two countries. This conflict of characterization may arise, for example, from the fact that in one country the place of signature, and in the other the place of delivery, is regarded as the place of making, or, in the case of contracts by correspondence, from the fact that in one country the place of posting an acceptance, and in another the place of receipt by the offeror, is regarded as the place of making (*u*). The conflict would seem to be irreconcilable, and there would seem to be no justification for departing from the rule that the connecting factor must be characterized in accordance with the *lex fori* (*v*). If the question whether a valid contract has been

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(*t*) See § 4 of the present chapter, *infra*.

(*u*) See chapter 14, § 2(b).

(*v*) Cf. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 Columbia L. Rev. 247, at pp. 252, 253, 267, 268.

made depends on the law of the place of making, it would seem to be impossible, without reasoning in a circle, to refer the question of the existence of the contract to the law of a given foreign country on the assumption that it is the law of the place of making, and also to leave to that law the decision of the question whether that country was the place of making.

The situs of a thing is in general use as the connecting factor with regard to all questions of proprietary interest in the thing (*w*), and in the case of a tangible thing the situs is a matter of fact, an actual situs as to which there can hardly be any conflict of characterization. If the thing is intangible, however, there may be different opinions as to the legal situs which should be attributed to it, and consequent conflict of characterization of situs as between two countries. Moreover, there may be difference of opinion as to the extent to which the situs of an intangible thing should be used as the connecting factor.

## II. APPLICATION OF THE PROPER LAW.

### § 3. The Proper Law and the Factual Situation.

It might at first sight seem that if the question has been characterized, and the connecting factor and consequently the proper law have been selected, the application of the proper law should present no difficulty, but sometimes this is far from being the case. A cursory retrospect may serve to make clear the nature of the operation which is here designated the application of the proper law. The thing which is characterized is not the factual situation, but the juridical question raised by the factual situation, including its various place elements. One of these place elements is selected by the court as the connecting factor appropriate to the question, that is, the factor which connects the situation with some country, and this selection of the connecting factor leads to the selection of the law of a given country as the proper law. The specific provisions of that law appropriate to the question must now be applied.

At this point it is important to consider exactly what provisions of the proper law are to be applied, and to what they are to be applied. The various place elements in the factual situation which were important for the purpose of enabling the court to select the proper law now become, as a general rule, unim-

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(*w*) See chapter 4, §7, and cross-references there given.

portant and must, so to speak, be eliminated from the situation. The conflict rules of the forum are presumably such as will, in the view of the forum, produce a socially desirable result, and, guided by these rules, the court has designated a given place element as the connecting factor, and there can, as a general rule, be no question of applying the proper foreign law in such a way as to reconsider or reverse the selection of the connecting factor. The court is therefore not concerned with the view of the foreign law as to which of various place elements is important, and the rule of the foreign law which is to be applied must not be a rule based upon the view of the foreign law as to the importance to be attached to various place elements. For the purpose of applying the proper law to the factual situation, the situation must, as a general rule, be divested of its actual place elements and must in imagination be wholly localized in the country the law of which has been selected as the proper law, and the law to be applied must, as a general rule, be the law which would be applicable not to the actual situation, but to a situation in which the facts have all taken place in that country. It is therefore not strictly accurate to speak of "applying" the law of this country or that country to the actual situation, or to speak of the actual situation being "governed" by the law of this country or that country. If the place elements are situated, some in one country and some in another, the normal or domestic rule of neither country can apply to or govern the actual situation. What the court does, as a general rule, is to apply to the factual situation a rule similar to or identical in scope with the domestic rule of the proper law, that is, a rule formulated by the forum but modelled on the domestic rule which in the selected country would be applied to a hypothetical similar situation arising in that country and containing, from the point of view of that country, no foreign element. This is, however, only a general rule, and it always depends on the policy of the law of the forum whether and to what extent the court resorts to foreign law. Furthermore, it is not strictly accurate to speak of a court's "applying" rules of foreign law in any sense, because the forum enforces only its own law and consequently only rights created by that law, although in a situation in which some of the place elements are foreign the forum may model its own rules upon the domestic rules

of some foreign law for the purpose of giving remedies at the forum (a).

One point of difference between the selection of the proper law and the application of the proper law may be illustrated by the conflict rules relating to succession to an interest in land. Almost universally, it is recognized that the appropriate connecting factor is the situs of the land, and even in an Anglo-American country, by the domestic law of which interests in land are classified as real property and personal property, the *lex rei sitae* is, as a general rule, selected without regard to the question whether the interest in issue is classified as real property (as, for example, a freehold estate in land) or as personal property (as, for example, a leasehold estate in the land or a mortgagee's interest in the land). In other words the proper law is selected on the basis of the distinction between interests in land and interests in other things. On the other hand, when the proper law selected on this basis is to be applied to the factual situation, the law to be applied is, as a general rule, the domestic law of the situs, and if that law is one which differentiates between devolution of real property and devolution of personal property, the succession will be governed by the domestic rules appropriate to real property or personal property, as the case may be. In other words a classification of property of the domestic rules of the *lex rei sitae* or of the *lex fori* which is immaterial in the selection of the proper law may become material in the application of the proper law (b).

#### § 4. Patent Conflict of Connecting Factors.

The logical sequel of the foregoing discussion would be the specific discussion of the patent conflict of conflict rules that occurs when the conflict rules of two are on their face different, as, for example, when a conflict rule of one country says that the *lex domicilii* governs a given question, such as succession to movables, and a conflict rule of another country says that the question is governed by the *lex patriae* (c).

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(a) Further discussion here of the statements made in the text is unnecessary because they are all discussed in chapter 2, § 2(2) (3). As to the exceptional cases in which a court may "apply" rules of the law of a foreign country in the sense that it may decide a case, including all the actual place elements of the factual situation, in the same way as a court of the foreign country would decide the same case, see chapter 8, § 6, and chapter 9, § 5.

(b) See chapters 21, 24, 26 and 29.

Examples of this kind of conflict of conflict rules are to be found in English cases. For example, in *In re Ross* (d) there was a conflict between an Italian conflict rule that succession to both land and movables is governed by the national law of the *de cuius*, and English conflict rules that succession to land is governed by the *lex rei sitae* and succession to movables by the *lex domicilii*. Again, in *In re Askew* (e) there was a conflict between a German conflict rule that legitimation by subsequent marriage is governed by the national law of the child's father and an English conflict rule that the question is governed by the law of the domicile of the father. These and other English cases have been the occasion of much discussion by judges and other persons of the doctrine of the *renvoi*. Possibly different considerations apply to patent conflicts of connecting factors now in question and latent conflicts of connecting factors (f), but in any event I have discussed problems of the *renvoi* so fully in other chapters (g) that further discussion here would be mere repetition.

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(c) Kahn's first class of *Gesetzkollisionen* (see chapter 3, § 1), as distinguished from his second class, discussed in § 2 of the present chapter, *supra*.

(d) [1930] 1 Ch. 377: see chapter 7, § 6(5)(b). See also *In re O'Keefe*, [1940] Ch. 124, discussed in chapter 9.

(e) [1930] 2 Ch. 239: see chapter 7, § 7(3).

(f) Discussed in § 2 of the present chapter, *supra*.

(g) See chapters 7, 8, 9 and 10, and chapter 22, § 2(8).

## CHAPTER VI.

### CHARACTERIZATION: POSTSCRIPTA\*

- § 1. Robertson on characterization, p. 98.
- § 2. Cormack on *renvoi*, characterization and preliminary question, p 101.

#### § 1. Robertson on Characterization.

Much has been written on the problem of characterization in the conflict of laws since the publication of my earlier articles (a). Outstanding is Robertson's book (b), which began with an appraisal of articles by Lorenzen, Beckett and Unger, as well as my own. I was of course gratified that the learned author courteously devoted a good deal of space to a statement and discussion of my views. As was to be expected, he did not agree with all that I had written and I have in the course of the present book referred to his valuable discussion of various topics. As regards minor differences of opinion there would be no occasion or justification for my saying anything more, but as regards his main conclusions and the thesis which underlies them, I venture respectfully to record my dissent in the following observations.

The distinction between primary characterization and secondary characterization is the key to Robertson's approach to the problem of characterization in the conflict of laws and is the foundation upon which he builds his system. Certain matters are the subject of primary characterization, and other matters are the subject of secondary characterization. Primary characterization consists in the determination of the juridical nature of the problem presented for adjudication (c), or the subsumption of facts under categories of law (d), and this characteriza-

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\*The second section of this chapter reproduces a postscript published (1941), 19 Canadian Bar Review 334-341, as part of what is now chapter 9. The first section is new.

(a) Now reproduced in chapters 3, 4 and 5.

(b) Characterization in the Conflict of Laws (Harvard University Press, 1940).

(c) Robertson, *op. cit.*, p. 46.

(d) *Ibid.*, pp. 62, 66.

tion must be made before the proper law is selected (e). Secondary characterization, which takes place after the proper law has been selected, consists in the "delimitation of the proper law; rules of law are being characterized" (f), or the "delimitation and application of the proper law" (g). Quite naturally, from his point of view, Robertson finds fault with me for discussing under "characterization of the question" matters which he thinks should be discussed under "application of the proper law", such as questions "whether a particular rule of law relates to formality or capacity, substance or procedure, form or procedure", these being matters that he regards as being the subject of secondary characterization (h). With all respect, I submit (1) that the distinction upon which he lays such stress is unreal and artificial, and that in any event he unduly enlarges the scope of secondary characterization, and (2) that it is desirable to extend the scope of "characterization of the question" to include various matters which he treats as subjects of secondary characterization.

If we seek for further information as to the principles upon which Robertson draws the line between primary characterization and secondary characterization, we seem to find it in the chapter entitled "analysis of primary characterization" and especially in his discussion of "categories" (i). Primary characterization is defined as "the allocation of a factual situation to, or the subsumption of facts under, a category of the conflict of laws of the forum", and "taken together the categories of conflict of laws should make provision for every type of case that arises, and provide a suitable choice of law rule for its solution." Nevertheless "in some cases one category will have not one but two choice of law rules designating appropriate systems of law." Thus, "marriage" is a single category with two separate conflict rules as to formalities and capacity respectively, and there are not two separate conflict rules relating to two categories, "formalities of marriage" and "capacity to marry". "The essential concept which has significance by itself, and is analogous to such other concepts as contract or tort, is marriage; formalities and capacity only have significance as subdivisions

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(e) *Ibid.*, p. 46.

(f) *Ibid.*, p. 46.

(g) *Ibid.*, pp. 118 ff.

(h) Robertson, *op. cit.*, p. 46.

(i) *Ibid.*, pp. 86 ff.

of marriage, in the same way that substance and procedure only have significance as subdivisions of such categories as contract and tort." "It is submitted, then, that marriage or, more accurately, validity of marriage, is one of the categories of conflict of laws, analogous to contract, tort, succession to movables, succession to immovables, and the like . . . . It will be enough for the present to say that a category of conflict of laws exists, or must be formulated, for every type of case for which a choice of law rule is necessary, and besides the examples just mentioned there will be such further categories as administration, distribution, divorce, nullity, matrimonial property, legitimacy, adoption, assignment of intangibles, assignment of tangible movables, alienation of immovables, and so on."

If I have not misunderstood Robertson, it is the function of the forum simply to allocate a case to its proper "category", the categories being defined by the system of conflict of laws of the forum and not being necessarily the same as the categories of the domestic law of the forum. The forum having allocated a case to a given category, as, for example, validity of marriage, the subdivisions of that category involve the secondary characterization of rules of the proper law selected on the basis of the allocation of the case to a certain category, and that secondary characterization must be made in accordance with the proper law. Exactly how the forum is to select the proper law by allocating a case to a "category" if that category has two "subdivisions" for each of which there exists a separate conflict rule is not clear, and I submit that any question as regards which there is or may be a separate conflict rule may be the subject of characterization by the forum. Again, there seems to be a large element of individual opinion as to the categories that are significant for the selection of the proper law and are the subject of primary characterization and subdivisions that are not significant for the selection of the proper law and are the subject of secondary characterization, or, stated more broadly, between what is the subject of primary characterization and what is the subject of secondary characterization; and in fact various writers who distinguish between primary characterization and secondary characterization are not even approximately in agreement as to where the line is to be drawn between them.

It would appear that under Robertson's treatment the process of characterization become one of strict logic based on premises that are artificial or not generally accepted. It is pushing logic

too far, it is submitted, to exclude characterization of foreign rules of law from the scope of characterization of the question for the purpose of the selection of the proper law. Indeed, there would seem to be no logical objection to the forum's provisionally consulting foreign law and characterizing rules of foreign law before finally characterizing the question for the purpose of the selection of the proper law, so that characterization of such rules of law may be an essential part of the characterization of the question. After the publication of my original articles I wrote some supplementary remarks on the point just mentioned in an article (*j*) which Robertson notes (*k*), and after the publication of his book I wrote a further postscript (*l*), so that I have no excuse for saying anything more here. The general tendency of his exposition is to restrict the field of operation of the conflict rules of the law of the forum, so as to compel a court blindly to accept the view of a foreign law upon various matters that the court should itself decide. It is submitted that the conflict rules of the law of the forum ought to be construed and applied in such a way as to extend the scope of activity of a court in giving effect to the policy of the law of the forum as to what is socially convenient or practically expedient (*m*).

## § 2. Cormack on Renvoi, Characterization and Preliminary Question.

One item in the series of writings concerning characterization in the conflict of laws (*a*) is Cormack's comprehensive article entitled *Renvoi, Characterization, Localization, and Preliminary Question in the Conflict of Laws* (*b*). A special feature of this

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(*j*) Now reproduced in chapter 8, § 7.

(*k*) *Op. cit.*, p. 49.

(*l*) Now reproduced in § 2 of the present chapter.

(*m*) *Cf.* chapter 2, § 2(2)(3).

(*a*) Husserl, *The Foreign Fact Element in Conflict of Laws* (1940) 26 *Virginia L. Rev.* 453; Pascal, *Characterization as an Approach to the Conflict of Laws* (1940), 2 *Louisiana L. Rev.* 715; Robertson, *Characterization in the Conflict of Laws* (1940); Nussbaum, review of Robertson (1940), 40 *Columbia L. Rev.* 1461; Yntema, review of Robertson (1941), 4 *U. of Toronto L.J.* 233; Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws* (1941), 50 *Yale L.J.* 743; Cook, *Characterization in the Conflict of Laws* (1941), 51 *Yale L.J.* 191, reprinted with *Supplementary Remarks*, 1942, in *Logical and Legal Bases of the Conflict of Laws* (1942) 211.

(*b*) (1941), 14 *So. Calif. L. Rev.* 221.

article is that the author makes *renvoi* the central theme to which characterization is merely subsidiary. I venture merely to make some observations on particular points as to which, with due respect, some expression of doubt or dissent would seem to be justified.

Cormack states (pp. 257 ff.) his reasons for thinking that the doctrine of the *renvoi*, as a general principle, should be rejected but admits some exceptions, as, for example in the case of "property" and "status" (pp. 262 ff.). He thinks that the doctrine of the preliminary question is "illusory" (p. 243), but that the distinction between primary characterization and secondary characterization is "sound" (p. 236). As regards the rejection of the *renvoi* as a general principle, and the existence of exceptions, I agree, though I should be disposed to state the exceptions somewhat differently (*c*). I agree also as regards the "preliminary question", but doubt the soundness or utility of the doctrine of "secondary characterization".

As to Cormack's exception of "property" from his rejection of the doctrine of the *renvoi* as a general principle, I agree to this extent, that questions of proprietary interests in things must be treated exceptionally because overriding effect must be conceded to the *lex rei sitae* so far as by that law a person has a proprietary interest (*d*). This is clear at least with regard to an interest in an immovable thing (land). As regards an interest in a tangible movable thing (chattel), the *lex rei sitae* should also be decisive, but precisely because of the mobility of the thing in which the interest exists or is claimed, the practical necessity for conceding overriding effect to the *lex rei sitae* may not always exist.

The matter may be put in another way, so as to introduce some observations relating to the distinction between primary characterization and secondary characterization. If the question may be one of a proprietary interest in land, a court in a country other than that of the situs must decide in accordance with the *lex rei sitae* whether such interest exists (*e*), and it is immaterial whether the result is expressed in terms of total

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(c) See chapter 8, § 6, and chapter 9, § 5.

(d) Subject to some mental reservations as regards the reality of the distinction between property or proprietary interests in a thing, and merely personal rights, etc., with respect to a thing. See chapter 4, § 7, and cross-references there noted.

(e) Cf. chapter 4, § 7.

*renvoi* (*f*) or secondary characterization or what not. The forum must decide as a court of the situs would decide, and if the *lex rei sitae* makes the result depend on the distinction between real property and personal property, that is merely an example of the application of the domestic rules of the proper law to a case in which the *lex rei sitae* has already been selected on the basis of the distinction between immovables and movables or at least without regard to the distinction between realty and personalty (*g*). In such case if the result is expressed in the form "that the question for primary characterization is whether the problem relates to a property matter, and that it must then be decided by secondary characterization whether the property is real or personal" (*h*), this mode of statement does not afford an example of secondary characterization which is material to the decision. In other words, examples of secondary characterization in accordance with the *lex causae*, to be of any real significance, must present situations other than those in which the forum is prepared in any event to adopt the doctrine of the *renvoi*, including necessarily characterization in accordance with the *lex causae*. Thus, apart from the practical difficulty that those who advocate the theory of secondary characterization by the *lex causae* are not even approximately agreed on where the line is to be drawn between primary and secondary characterization, the difficulty presents itself that in effect the theory involves, at least partially, the adoption of the doctrine of the *renvoi*. The latter difficulty exists, of course, only for those who think that the doctrine of the *renvoi*, as a general principle, should be rejected (*i*). They, at least, are bound to consider how far any examples they give of secondary characterization in accordance with the *lex causae* are reconcilable with their general anti-*renvoi* attitude (*j*).

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(*f*) Cf. chapter 9, § 1.

(*g*) As to this point of difference between the selection of the proper law and the application of the proper law, see chapter 5, § 3, and the cross-references there given in note (b).

(*h*) Cormack, *op. cit.*, p. 237.

(*i*) Robertson, *Characterization in the Conflict of Laws* (1940) 103-104, approves of the *renvoi* as a general principle applicable to cases arising between states of the United States of America, but reserves judgment as to other cases. At p. 156 he mentions *renvoi*, preliminary question and secondary characterization as being different methods of giving effect to the *lex causae*.

(*j*) Cheshire, *Private International Law* (2nd ed. 1938) 65, is especially emphatic in his condemnation of the doctrine of the *renvoi*. He suggests no exceptions, and takes no notice of the possible interrelation of *renvoi* and secondary characterization.

As to Cormack's exception of "status" from his rejection of the doctrine of the *renvoi* as a general principle (*k*), the exception should, it is submitted, be limited to the existence of status as distinguished from capacity and from the incidents or consequences of status (*l*). Again, it would seem to be clear that if the existence of a status depends solely upon the validity of a given marriage (whether it is the status of the parties as married persons or that of a child of the marriage), there is no question of status as such, governed by the proper law of status, but a question of marriage law. The validity of the marriage must be decided as an independent question, the governing law being selected according as the question is characterized as one of formalities of celebration, or one of capacity to marry or one involving some other phase of intrinsic validity (*m*). Precise characterization of each question arising in a given factual situation and the consequent selection and application of the proper law governing that question will furnish an answer to that question. There may be two or more questions arising in a given factual situation, and they may have to be answered separately by the selection and application of different proper laws respectively. It may happen that what looks like a question of status is really not an independent question, but a result which follows of course from the answer to another question, as in the example given above of the status of a person as a married person or as a child of the marriage. Generally, however, there would not seem to be any valid ground for saying that merely because a given question is the principal (or ultimate) question to be decided by a court in a given case, other questions must be treated as preliminary questions to be decided in accordance with the proper law of the principal question (*n*). The doctrine of the preliminary question would appear to be not merely illusory, but also misleading in the sense that its application may in effect involve, to an extent that its advocates would not approve, the adoption of the doctrine of the *renvoi* (*o*).

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(*k*) Cormack, *op. cit.*, pp. 262 ff.

(*l*) See chapter 7, § 7(2).

(*m*) Therefore, with respect, I am unable to agree with Cormack, *op. cit.*, p. 267, when he says that I "erroneously" distinguish marriage law from that governing status.

(*n*) Cf. examples given in chapter 8, § 4, and (as to status dependent on marriage) § 6.

(*o*) Cf. Cormack, *op. cit.*, pp. 243-249, leading to the conclusion that the doctrine of the preliminary question is unsound; contrast

One of the examples of secondary characterization given by Cormack (*p*) is the characterization of a requirement of parental consent to the marriage of minors. Cheshire (*q*) thinks that it is a matter of primary characterization. Cormack is quite aware that secondary characterization by the *lex causae* may involve the *renvoi*, because he states, as to secondary characterization, that the "purpose of looking to the law of the other jurisdiction is to dispose of the problem as it would be disposed of there" (*r*), and his examples of secondary characterization all appear to be cases which might be brought within his exceedingly wide concepts of "property" and "status" exceptions to his rejection of the *renvoi* as a general doctrine. Whether these concepts are too wide is of course another question. Thus, he says, if the forum in country X has to adjudicate on the validity of the marriage of parties domiciled in country Y who are married in country Z, without consent of parents, the primary characterization is that the question is one of the creation of marital status, to be determined by the law of the domicile, and therefore the forum must decide in accordance with the secondary characterization of the law of Y whether a requirement of parental consent relates to capacity to marry or to formalities of celebration (*s*). This analysis of the problem would not seem, however, to correspond with the way in which a court should or would deal with a case of this kind. I venture to submit, firstly, that from a practical point of view it is unlikely that an Anglo-American court would analyze the problem in terms of primary characterization and secondary characterization, involving the abandonment to the *lex causae* of the secondary characterization, and that such an analysis is not justified unless the forum considers that the case is one in which it is prepared to adopt the theory of total *renvoi* and therefore decide the case as it would be decided by a court of the domicile; and, secondly, that the analysis suggested involves a *petitio principii*, because the selection of the law of the

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Robertson, *Characterization in the Conflict of Laws* (1940) 135-156, approving of the doctrine, even though it involves the *renvoi*.

(*p*) *Op. cit.*, 235. See also Robertson, *op. cit.* (1940) 45, 53, 239-245; contrast my discussion in chapter 4, §§ 1, 2.

(*q*) *Private International Law* (2nd ed. 1938) 34-36.

(*r*) Cormack, *op. cit.*, p. 234, adding in a footnote: "Assuming agreement upon the part of that jurisdiction as to primary characterization, which will generally exist."

(*s*) Cormack, *op. cit.*, p. 235; admittedly involving the *renvoi*, *ib.*, note 89.

domicile as the proper law depends on the characterization of a provision of that law, which must necessarily precede the selection of that law as the proper law, and that there is no sufficient justification for saying that the question is one of status which the forum must decide in accordance with the law of the domicile. So far as the forum in X can characterize the question at all in the abstract, that is, without regard to the specific provisions of the laws of Y and Z which may be applicable, the forum cannot, it is submitted, do more than say that the question is one of the validity of a marriage, and (assuming that there is no material question of procedure or public policy of the forum governed by the *lex fori* as such) in accordance with its own conflict rules the forum will subdivide the question of the validity of the marriage into two questions, that of intrinsic validity, governed by the law of Y (the *lex domicilii*), and that of formal validity, governed by the law of Z (the *lex loci celebrationis*). Only when the forum is informed of the specific provisions of the law of Y or the law of Z does any real problem of characterization arise (t). If we assume that the only alleged ground of invalidity is the lack of parental consent, the forum cannot select the proper law until it has characterized the provision of the law of Y, or that of the law of Z, or both, relating to parental consent. A requirement of the law of Y which the forum characterizes as a matter of intrinsic validity will be applicable to the marriage because of the domicile of the parties in Y. Similarly a requirement of the law of Z which the forum characterizes as a matter of formal validity will be applicable to the marriage because of the celebration of the marriage in Z. In the circumstances the forum consults the provisions of the laws of Y and Z, not because it has selected either of these laws as the proper law, but tentatively or provisionally in order to characterize their provisions for the purpose of selecting the proper law from among the potentially applicable laws. The forum must consider the specific provision of each of the laws of Y and Z in its context, but in characterizing the provision of a given foreign law the forum, on the one hand, will not be bound to characterize it in

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(t) The court might of course, by a short cut, reach this problem in a slightly simplified form, if it appeared *ab initio* that the only question was the effect of the failure of the parties to obtain parental consent under a provision of a given foreign law, whether that of Y or that of Z. The court would then go directly to the characterization of the provision of the given foreign law.

the same way as a court of the foreign country would characterize it, and, on the other hand, will not characterize the provision solely in accordance with the concepts of the *lex fori*, that is, it will not decide that the provision of the foreign law is a matter of intrinsic validity or is a matter of formal validity, as the case may be, merely because a requirement of the *lex fori* as to parental consent, differently expressed or in a different context, and *ex hypothesi* inapplicable to the marriage under consideration, is characterized in the domestic law of the forum in one way or the other. It is submitted that the suggested method of approach may fairly be described as a *via media* between characterization in accordance with the local concepts of the forum and characterization in accordance with the *lex causae* (u).

In conclusion, it would seem to be doubtful whether the doctrine of secondary characterization in accordance with the *lex causae* has any utility as an independent doctrine. If the question is characterized as one with regard to which the forum is prepared to adopt the doctrine of the *renvoi*, the forum will of course adopt the secondary characterization of the *lex causae* in the application of the proper law. If the question is one which can be finally characterized only after examination of the provisions of a foreign law, the characterization necessarily precedes the selection of the proper law and is not secondary characterization. In the first kind of case, secondary characterization, if any, in accordance with the *lex causae* is an inevitable incident of the adoption of the doctrine of the *renvoi* by the forum, while the second kind of case does not raise the problem of secondary characterization. Other kinds of cases have been put forward as presenting problems of secondary characterization, but those who put them forward are not in agreement with each other. It appears that one writer analyzes a case in such a way that a given question is the subject of primary characterization, prior to the selection of the proper law and strictly in accordance with the *lex fori*, and that another writer analyzes the case in such a way that the same question is the subject of secondary characterization, after the selection of the proper law and strictly in accordance with the *lex causae*. This lack of agreement in itself suggests doubt as to the validity or utility of the distinction between primary and secondary characterization, and the process of characterization would seem to be

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(u) Cf. chapter 4, §§ 1, 2.

too artificial or too much a matter of individual opinion to serve as a working guide to a court (*v*). Except in cases involving the *renvoi* courts are too much inclined to characterize a question in accordance with the local concepts of the *lex fori* (*w*). They should be encouraged to characterize questions, not in the abstract or in the dark, but in the light of the provisions of potentially applicable laws and prior to the final selection of the proper law (*x*), but that is a very different thing from asking them, under the guise of secondary characterization, to deliver over to the tender mercies of a foreign law the construction and application of the conflict rules of the forum (*y*).

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(*v*) Cf. Yntema, *op. cit.*, note (*a*), *supra*, (1941) , 4 U. of Tor. L.J. at p. 234.

(*w*) As was done in *Ogden v. Ogden*, [1908] P. 46.

(*x*) Yntema, *op. cit.*, at p. 234: "No inherent necessity requires the settlement of the so-called primary characterizations before the various alternatives are explored." See also chapter 8, § 3.

(*y*) Nussbaum, reviewing Robertson's book (1940), 40 Columbia L. Rev. 1467-1468, says "In fact the author considerably overdoes Cheshire's views; this is perhaps the most original feature of his disquisition. In order to establish a kind of balance between 'primary' and 'secondary' qualifications, he tends to inflate the latter by allocating to it situations which in reality are subject to primary qualification under the law of the forum."

## CHAPTER VII.

### RENOI AND SUCCESSION TO MOVABLES\*

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  - (1) *Renvoi* in German law, p. 148.
  - (2) Status in the conflict of laws, p. 150.
  - (3) *In re Askew*, p. 151.
- § 8. Conclusion, p. 154.

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\*This chapter reproduces an article, bearing the same title, published (1930), 46 Law Quarterly Review 465-485, and (1931), 47 Law Quarterly Review 271-293, and [1932] 1 Dominion Law Reports 1-47, and under the title *Renvoi et Succession Mobilière* (1932), 27 *Revue de Droit International Privé* 254-278, 450-479. The article has been substantially revised so as to co-ordinate it with the subsequent chapters relating to the *renvoi*.

## § 1. Introduction.

The doctrine of the *renvoi* may be illustrated by the following case. A, of English domicile of origin, dies intestate, domiciled (in the English sense) in Utopia, but without having an authorized domicile there in accordance with Utopian law, leaving movables situated in England and Utopia. An English court has to decide how the surplus of the English movables, after payment of debts and testamentary expenses, shall be distributed. By an English rule of conflict of laws, as regards the succession to the movables the court is referred to the law of the country in which A was domiciled at the time of his death, that is, the law of Utopia. The English court is informed by the evidence of expert witnesses (a) that by the corresponding conflict rule of the law of Utopia succession to A's movables is governed by the law of the last domicile of A, but (b) that in the circumstances a court in Utopia would decide that A was not domiciled in Utopia, and that his movables would be distributed in accordance with the law of England, the country of his domicile of origin. The English court, having been referred by its own conflict rule to Utopian law, and finding that there is a reference back, or *renvoi*, by the corresponding Utopian conflict rule, accepts the *renvoi* and distributes the English movables in accordance with English domestic law, that is, as if A had been domiciled (in the English sense) in England at the time of his death (a).

In the case supposed there is, however, an alternative course open to an English court. It may say that the reference by its own conflict rule to the law of Utopia is a reference to the domestic rules of Utopian law, that is, the law which in Utopia would be applied in the case of a Utopian national dying, intestate, domiciled (in the Utopian sense) in Utopia; and, accordingly, the English movables would be distributed in accordance with the domestic Utopian law of succession on intestacy without regard to any evidence of the experts with regard to Utopian conflict of laws, that is, without regard to the way in which the Utopian movables of A's estate would be distributed in Utopia.

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(a) The example given in the original article was that of a British subject dying domiciled in Italy, intestate, with a reference by the Italian conflict rule to the national law of the deceased. This example was superficially simple, but was full of inherent difficulties, which are discussed in chapter 9, § 4, and the innocuous example given in the text has been substituted for it.

The object of the present chapter is to reconsider the English cases which are usually cited (*b*) as impliedly or expressly supporting the doctrine of the *renvoi*, with especial reference to succession to movables on death. It is submitted, in view of the inherent inconsistencies of certain lines of reasoning, and the strange results of the doctrine as applied to different sets of facts, that the supposed authorities for the *renvoi* are, to say the least, singularly weak, and that any advantages which it is supposed to possess either disappear on examination or are outweighed by its disadvantages (*c*). For the sake of convenience of reference the leading articles and notes written in English and containing a discussion of the *renvoi* are mentioned in a foot note (*d*). Without traversing again the whole field, it

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(*b*) See e.g., Westlake *Private International Law*, chapter 2 (Domicile and Nationality—*Renvoi*), and the longer list of cases cited in Dicey, *Conflict of Laws* (5th ed. 1932), Appendix, note 1. Meaning of "Law of a Country," and the Doctrine of the *Renvoi*.

(*c*) The sentence in the text is reprinted here exactly as it appeared in the original article, but the objection there stated to the doctrine of the *renvoi* should be understood as being limited to the acceptance of that doctrine as a general rule applicable to all types of situations. As will appear in the further discussion of the *renvoi* in chapters 8, 9 and 10, the *renvoi* may be admissible as a special device for reaching a desirable social result in some exceptional classes of cases—not including, however, cases of succession to movables on intestacy or questions of the intrinsic validity of a will of movables. As is explained in § 6(2) (a) of the present chapter, *infra*, the formal validity of a will of movables must, in my opinion, be treated in a special manner.

(*d*) In England, in addition to Westlake, *op. cit.*, and Dicey, *op. cit.*, see Bate, Notes on the Doctrine of *Renvoi* in *Private International Law* (London 1904); Abbott, Is the *Renvoi* a Part of the Common Law? (1908), 24 L.Q. Rev. 133; Brown, *In re Johnson* (1909), 25 L.Q. Rev. 145; Bentwich, The Law of Domicile in its Relation to Succession and the Doctrine of *Renvoi* (London, 1911); Baty, Polarized Law (London, 1914) 115 ff.; review by Pollock (1915), 31 L.Q. Rev. 106; 6 Halsbury, Laws of England (1909), 223, especially note (*r*); Pollock, The *Renvoi* in New York (1920), 36 L.Q. Rev. 91. Some later writers are cited in chapter 8.

In the United States the prevailing opinion is adverse to the doctrine. See Lorenzen, The *Renvoi* Theory and the Application of Foreign Law (1910), 10 Columbia L. Rev. 190, 327; Lorenzen, The *Renvoi* Doctrine in the Conflict of Laws; Meaning of "The Law of a Country" (1918), 27 Yale L.J. 509; Schreiber, The Doctrine of the *Renvoi* in Anglo-American Law (1918), 31 Harv. L. Rev. 523; Conflict of Laws Restatement (1934) §§ 7, 8; 1 Beale, Conflict of Laws (1935) 55 ff.; *In re Tallmadge* (1919), 181 N.Y. Supp. (215 N.Y. St.) 336, 109 Misc. Rep. (N.Y.) 696. See also some later writers cited in chapter 8.

Some account of the doctrine of the *renvoi* in France is given in § 6(4) (c), *infra*.

is attempted in the present article to discuss the subject from a somewhat different point of view.

In connection with the distribution of the movables of a deceased person the *renvoi* may prove to be a complicating factor in at least three classes of cases: (a) cases relating to the formal validity of a will; (b) cases relating to status and capacity; and (c) cases relating to the intrinsic validity or legal effect of a will or relating to succession on intestacy. Class (b) is separately stated because in some foreign countries it falls under a distinct rule of conflict of laws. The reported English cases relate chiefly to classes (a) and (c).

In a relatively large number of cases decided by English courts which have involved or have been supposed to involve the *renvoi* the foreign law in question has been the law of France, and a frequently recurring element has been the peculiar view of French law as to domicile resulting from the provision of art. 13 of the French Civil Code (now repealed, but hereinafter discussed with some particularity). The principal examples of the possible application of the *renvoi* will therefore be situations in which the competing laws are English law and French law respectively, and by way of introduction to the discussion of those situations a comparative statement of rules of the conflict of laws seems desirable.

The contrast between English and French conflict rules, in the three classes of cases mentioned above, is susceptible of being stated shortly, and at the same time with sufficient accuracy for the present purpose.

So far as Ontario and the other common law provinces of Canada are concerned, it is assumed that the prevailing rules of the conflict of laws are identical with the English rules. The province of Quebec, however, is in a special position. Its law as to property and civil rights, derived for the most part from French law, was codified in 1866 under the title of the Civil Code of Lower Canada. This Code, unlike the French Civil Code, contains a comprehensive series of provisions relating to the conflict of laws, and such of these provisions as are relevant to the subject of the present article are included in the following comparative statement of rules of conflict of laws.

## § 2. Formal Validity of Will.

Apart from Lord Kingsdown's Act (*e*), the English rule is that the law governing the formal validity of a will of movables

is the law of the domicile of the testator at the time of his death — the connection between succession to movables and the personal law or statute of the *de cujus* having been adopted in England in its extreme form, not only requiring that distribution should be made in accordance with the law of the domicile, but also, differing from the rule more widely prevailing in Europe, requiring the will to be made according to the forms of the domicile (*f*).

Article 7 of the Civil Code of Lower Canada provides that "acts and deeds made and passed out of Lower Canada are valid, if made according to the forms required by the law of the country where they were passed or made." This provision applies to the making of a will of movables, and has been held by a majority judgment of the Supreme Court of Canada (*g*) to be permissive or facultative, not imperative or obligatory, so that in the alternative, a will made in accordance with the forms of the domicile is valid.

The French Civil Code contains no general provision corresponding with article 7, but it is provided by article 999 that a Frenchman may, in a foreign country, make a will either by act under his private signature or by authentic act in accordance with the forms in use in the place in which the will is made (*h*). This rule is facultative, not obligatory, so that a Frenchman may, in a foreign country, make a will, valid in France, in accordance with the forms prescribed by his own national law. Similarly, it appears to be the prevailing French view that a foreigner may, in France, make a will in local French form, or alternatively, make a will, valid in France, in accordance with the forms of his own national law (*i*). The French law as to the validity of a foreigner's will was, however, formerly somewhat obscured by the provision of article 13 of the French Civil

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(*e*) See § 6(2) (c), *infra*, and chapter 23.

(*f*) Cf. Westlake, Private International Law, chapter 2.

(*g*) *Ross v. Ross* (1894), 25 Can. S.C.R. 307, overruling on this point the unanimous opinions of the judges of the Court of Queen's Bench for Lower Canada (1893), Q.R. 2 Q.B. 413. As to this case, see also § 6(6), *infra*.

(*h*) In accordance with the maxim *locus regit actum*, more exactly expressed in French, *la loi du lieu où se passe chaque acte en régit la forme* (*Guépratte v. Young* (1851), 4 DeG. & Sm. 217, at pp. 227-8).

(*i*) Pillet, *Traité Pratique de Droit International Privé* (Paris, 1924), vol. 2, §§ 610 ff.; Niboyet, *Manuel de Droit International Privé* (Paris, 1928), §§ 535 ff., 549 ff.

Code, to be discussed later (*j*), and at least as stated in evidence in English cases, the reference to the foreign testator's national law means in effect the law of his legal domicile in the French sense (*k*).

### § 3. Status and Capacity.

The English rule as to the capacity of a testator is, as regards movables, that the governing law is that of the testator's domicile at the time of his death (*l*).

Article 6 of the Civil Code of Lower Canada, after providing, subject to certain exceptions, that movable property is governed by the law of the domicile of its owner, provides that "an inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to status and capacity, remain subject to the laws of their country." By article 835 the capacity of the testator is considered relatively to the time of the making of the will (*m*).

Article 3 of the French Civil Code provides that the laws respecting the status and capacity of persons apply to Frenchmen, even if they are resident in a foreign country. The Code does not provide for the case of the foreign resident in France, but it is clear that the general rule of French law is that a person's status and capacity are governed by his national law (*n*). At this point, however, another question arises, namely, whether this rule as to capacity includes the law which defines or limits a testator's power of disposing of his property. The answer of French law to this question is that the disposing power of a testator is governed by the law which governs succession, that is, the *lex domicilii*, and not by the law which governs capacity. The rule as to capacity would, therefore, presumably be limited to questions as to the testator's personal capacity (as, for ex-

(*j*) See § 5, *infra*.

(*k*) See, e.g., the evidence as to the French law in *Collier v. Rivaz* (1841), in § 6(2) (a), *infra*; in *Bremer v. Freeman* (1857), 10 Moore P.C. 306, at p. 363; and in *Crookenden v. Fuller* (1859), in § 6(3), *infra*.

(*l*) Westlake, *Private International Law*, § 86.

(*m*) Johnson, *Conflict of Laws*, vol. 3 (1937) 66 ff.

(*n*) Niboyet, *Manuel de Droit International Privé* (1928), §§ 577 ff.; Weiss, *Manuel de Droit International Privé* (1920), pp. 581, 432 ff.

ample, the question whether he was of age, or the question whether he was of "sound and disposing mind, memory and understanding" (o), and the effect of any disposition made by him would nevertheless be subject to any limitations imposed by the law of his domicile upon his disposing power. Stating the matter in more general terms, the law as to status and capacity does not include any rule of law which is part of the law relating to things, obligations, succession or the form of acts (p).

#### § 4. Intrinsic Validity of a Will or Succession on Intestacy.

Before the passing of Lord Kingsdown's Act (q) the English rule as to the intrinsic validity or legal effect of a will of movables was that the governing law was the law of the domicile of the testator at the time of his death, but this rule is now subject to the provision of s. 3 of that statute that "no will . . . shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same" (r). In the case of intestacy the governing law as to distribution among the beneficiaries is the law of the domicile of the deceased owner at the time of his death (s).

By virtue of the provision of article 6 of the Civil Code of Lower Canada that movable property is governed by the law of the domicile of the owner, the Quebec rule is that succession on intestacy and the intrinsic validity of a will are governed by the law of the domicile of the *de cujus* at the time of his death, although it does not appear to have been decided whether the construction of a will should be governed by the law of the last domicile or by some other law (t).

Although not usually so stated in English cases (u), the French rule is substantially the same in terms as the English

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(o) Cf. articles 901 ff. of the French Civil Code; Pillet, *Traité Pratique de Droit International Privé* (1924), vol. 2, § 614, p. 440; Lorenzen, *French Rules of Conflict of Laws* (1928), 38 Yale L.J. 165, at p. 183.

(p) Niboyet, *op. cit.*, § 595 (*Influence des conflits de qualifications sur la compétence de la loi nationale*).

(q) See chapter 23.

(r) As to the effect of this provision, see chapter 22, § 2(6).

(s) Westlake, *Private International Law*, § 59.

(t) See Johnson, *Conflict of Laws*, vol. 3 (1937) 59 ff.; Cf. *McGibbon v. Abbott* (1885), 10 App. Cas. 653, especially at p. 659.

(u) See, e.g. *In re Trufort* (1887), 36 Ch. D. 600, at pp. 603-4, and *In re Annesley*, [1926] Ch. 692, at pp. 706-7, where the French rule

rule was before the passing of Lord Kingsdown's Act, that is, that succession to movables is governed by the law of the domicile of the *de cuius* at the time of his death; and for this purpose succession includes generally questions of the intrinsic validity or legal effect of a will and, in particular, any limitations imposed by law upon the disposing power of a testator. As stated by Niboyet (*v*):

Les meubles étant soumis, en droit positif français, à la loi du domicile du défunt, la succession présentera donc un caractère d'universalité, en principe (*w*).

La loi du domicile désigne les héritiers ou légataires, la quotité disponible et la réserve héréditaire; elle régit l'institution contractuelle, la validité des diverses dispositions testamentaires quant au fond, la forme du testament olographe en vertu du caractère facultatif de la règle *locus regit actum* (*x*), la succession anormale, la représentation, le droit du conjoint survivant, etc.

### § 5. Domicile in French Law.

Although on the face of it the French rule of conflict of laws as to succession to movables is the same as the English rule, in that both alike say that the governing law is the *lex domicilii*, the two rules are frequently different in their effect because in a given case the *de cuius* may be regarded by English law as being domiciled in one country, and by French law as being domiciled in another country. This difference of view as to the domicile of a given person may arise in either of two ways.

(a) It is much harder in English law than in French law to prove a change from a domicile of origin to a domicile of choice, so that it may easily happen that a person of French domicile of origin, resident in England, will be held by a French court to be domiciled in England and will be held by an English court to be still domiciled in France (*a*).

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was stated as if it referred to the national law, as such, of the *de cuius*, whereas in the case of a foreigner not domiciled in the French sense in France the reference is to the law of his domicile of origin. See Niboyet, *Manuel de Droit International Privé* (1928), §§ 723-725. The point is of some importance, as will appear in the subsequent examination of the English cases.

(*v*) *Manuel de Droit International Privé* (1928), § 733; cf. Pillet, *Traité Pratique de Droit International Privé* (1924), vol. 2, §§ 581 ff., 617. See also French Rules of Conflict of Laws by Lorenzen (1928), 38 Yale L.J. 163, at pp. 181, 187.

(*w*) Some exceptions are stated in Niboyet, *op. cit.*, §§ 734 ff.

(*x*) Niboyet, *op. cit.*, § 549, cited, *supra*, in connection with the rules as to the formal validity of a will.

(*a*) See, e.g. *In re Martin* [1900] P. 211; cf. *Winans v. Attorney-General* [1904] A.C. 287; Niboyet, *Manuel de Droit International Privé*, § 410, p. 493.

(b) An English court applies the strict rules of English law as to domicile impartially to a person of French domicile of origin resident in England and to a person of English domicile of origin resident in France. On the other hand, in the case of an Englishman resident in France, a French court might, more readily than an English court, find that he was domiciled *in fact* in France, but it would, before August 10, 1927, much less readily find that he had acquired a *legal* domicile in France, effective for the purposes of succession.

The date mentioned is that of the repeal of the famous article 13 of the French Civil Code. This article, it is submitted, is worthy of a solemn even though belated obituary notice in an English law review, not only because of the important bearing which its repeal will have on future cases, but also because in its life-time it gave so much trouble to English courts (*b*), and, as will appear, was chiefly responsible for a certain amount of misunderstanding by virtue of which the *renvoi* seemed to secure some foothold in English law. In its original form (1804) this article provided that a foreigner who had been admitted by the government to establish his domicile in France should enjoy all civil rights there so long as he continued to reside there. The words "by the government" (*par le gouvernement*) were replaced in 1807 by the words "by the authorization of the emperor" (*par l'autorisation de l'empereur*), and in 1816 by the words "by the authorization of the king" (*par l'autorisation du roi*), and so on. The chief, if not the only, object of the provision as to government authorization was to assure to a foreigner living in France the enjoyment of civil rights.

In 1889, however, the scope of article 13 was changed, when it was amended so as to provide that a foreigner authorized by decree to establish his domicile in France should enjoy all civil rights there; and that the effect of the authorization should cease on the expiration of five years, if the foreigner did not apply for naturalization or if his application for naturalization was refused. In other words, when the authorization expired, a foreigner living in France who desired to retain whatever rights the authorization gave him was virtually obliged to apply for naturalization. As a resident of France without government authorization he would, however, enjoy to a limited extent civil rights as to some matters.

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(b) This will appear abundantly in the subsequent examination of the cases.

Article 13 was repealed on August 10, 1927. On that date the Parliament of France passed a new law relating to French nationality, with the chief object of encouraging and facilitating the naturalization of foreigners resident in France; and it was considered useless to continue to provide for an intermediate status (that of a resident in France with an authorized domicile) between the status of a mere resident in France and that of a naturalized French citizen. The repeal of article 13 has simplified the question of the acquisition of a domicile in France. So long as article 13 remained in force cases involving English law and French law and governed by the law of the domicile were complicated by the fact that according to English law a resident of France might be domiciled there without having the authorization of the French government, whereas according to French law, at least for the purpose of succession to movables, a foreigner residing in France without government authorization was regarded as having no legal domicile in France and therefore as having retained his domicile of origin (c).

### § 6. The Renvoi.

The foregoing summary statement of certain rules of conflict of laws of different countries is sufficient to suggest a great variety of situations in which the doctrine of the *renvoi* may play a part. The broad question which any discussion of that doctrine raises is whether, when, for example, English law says that a case is governed by French law (the *lex domicilii*), an English court is to apply (a) domestic French law, that is, the ordinary law of France applicable to Frenchmen and French transactions, or (b) French rules of the conflict of laws. If an English court applies French conflict rules and those rules say that the case is governed by English law or some other law, there is, so to speak, a remission or *renvoi* of the case to English law, or a sending of it on to the law of some third country. Even if the laws of England and France both say that the *lex domicilii* applies, a similar question as to the *renvoi* arises if the *de cuius* was domiciled in the English sense in France, and was domiciled in the French sense in England. This latter situation has frequently arisen as between England and France, as will

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(c) See Niboyet, *Manuel de Droit International Privé* (Paris, 1928), §§ 286 ff, and § 410; cf. Dicey, *Conflict of Laws*, (4th ed., (1927), p. 821, note (d): *ibid* (5th ed. 1932) 873; Lorenzen, *French Rules of Conflict of Laws* (1927), 36 Yale L.J. 731, at pp. 732-734.

appear from the subsequent discussion, and it is therefore made the basis of the classification of hypothetical cases stated below.

(1) *Classification of Hypothetical Cases.*

*Case A.* The *de cujus* is a British subject of English domicile of origin, domiciled (in the English sense) in France at the time of his death, and domiciled in fact (in the French sense) in France but without having obtained from the French government an authorization to establish his domicile in France as provided in article 13 of the French Civil Code.

*Case B.* Same case as A, since the repeal of article 13 of the French Civil Code, or a similar case arising in connection with any foreign country the law of which does not include any provision corresponding with article 13.

*Case C.* The *de cujus* is a British subject of English domicile of origin, resident in France at the time of his death in such circumstances that in England he is held to have retained his English domicile of origin, whereas in France he is held to have acquired a domicile in fact in France though he has not obtained government authorization under article 13 of the French Civil Code.

*Case D.* Same case as C, since the repeal of article 13 of the French Civil Code, or a similar case arising in connection with any foreign country the law of which does not include any provision corresponding with article 13.

*Case E.* The *de cujus* is a French citizen of French domicile of origin, resident in England at the time of his death in such circumstances that in England he is held to have retained his French domicile of origin, whereas in France he is held to have acquired a domicile in England.

It may be supposed in each case that the *de cujus* dies, leaving movables both in England and in France, so that any question as to the validity of his will, or as to the mode of distribution of the beneficial interest in his movables, may arise in a French court as well as an English court. The variety of five cases may be multiplied by six by supposing, alternately, that the *de cujus*

- (1) makes, in France, a will in English form;
- (2) makes, in France, a will in French form;
- (3) makes, in England, a will in English form;
- (4) makes, in England, a will in French form;

(5) makes a will, valid as to form by both English law and French law, and intrinsically valid by English law, but intrinsically invalid by French law; or

(6) dies intestate.

Theoretically the foregoing furnishes us with thirty hypothetical cases, but practically some of these cases are of no importance for the present purpose. For example, in what we may call Case A (2), that is, the case of a testator, in the situation described in A, making in France a will in French form, the result is clear. The English rule that a will of movables is formally valid if made in accordance with the *lex domicilii* and the French rule that such a will is formally valid if made in accordance with the *lex loci celebrationis* agree in upholding the formal validity of the will both in England and in France, and no question of the *renvoi* arises. Similarly Case B (2) leads to the same result, the case not being affected by the repeal of article 13 of the French Civil Code. Some of the variants of Case A, however, give rise to interesting problems.

#### (2) Case A(1): Formal Validity of Will.

Case A (1) is of special interest. This is the case of a testator, in the situation described in A, making in France a will in English form. It is, in fact, the case which arose in *Collier v. Rivaz* (d), in *Bremer v. Freeman* (e), and *In re Lacroix* (f).

##### (a) *Collier v. Rivaz*.

In *Collier v. Rivaz* one Ryan, a British subject of Irish domicile of origin and subsequent English domicile of choice, and domiciled in the English sense in Belgium at the time of his death, made a will and six codicils. The question discussed in the judgment was as to the validity of four of the codicils, which were made, apparently in Belgium, according to the local forms of English law and not according to the local forms of Belgian law. The testator died in 1829, and at that time the French Civil Code was in force in Belgium and Holland, which from 1815 to 1830 were united in the Kingdom of the Netherlands. It was provided by article 13 of that Code that a foreigner who had been admitted by the authorization of the King to establish

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(d) (1841), 2 Curt. 855 (substituting Belgium for France).

(e) (1857), 10 Moore P.C. 306.

(f) (1877), 2 P.D. 94 (after the passing of Lord Kingsdown's Act).

his domicile in the kingdom should enjoy all civil rights there so long as he continued to reside there. Ryan had not obtained this authorization.

Three witnesses were examined as to the law of Belgium, and they were unanimous in saying that a foreigner resident in Belgium with government authorization was regarded practically as a subject of the country as regards the enjoyment of civil rights, and that without government authorization no domicile could be acquired in accordance with the law of Belgium. Sir Herbert Jenner (*g*), who heard the case in the Prerogative Court of Canterbury, decided on the evidence as to the *factum* of Ryan's residence in Belgium and as to his *animus manendi*, that is, in accordance with the English law, that Ryan was domiciled in Belgium at the time of his death, and that therefore the validity of the codicils was governed by Belgian law. He did not think it necessary to consider whether the witnesses understood domicile in the same sense or whether they did not rather regard it as being practically equivalent to naturalization, because he was convinced by the evidence of two of the witnesses that by the law of Belgium the successions of persons in Ryan's situation were governed by "the laws of their own country." As one of the two witnesses put it, they "did not lose their domicile of origin, and their successions consequently were not subject to the law of" Belgium. The learned judge then gave judgment in favour of the validity of the codicils in accordance with his now well-known formula (*h*), namely, that the court, sitting in England, "must consider itself sitting in Belgium under the particular circumstances of the case."

The application of this formula is more fully stated in the final portion of the judgment, as follows:

Then, according to the opinion of these gentlemen, well skilled in the practical application of the Code Napoléon and its dispositions, and which was the law in force in Belgium up to the year 1830, when the

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(*g*) Afterwards Sir Herbert Jenner Fust.

(*h*) The same judge, in the earlier case of *DeBonneval v. DeBonneval* (1838), 1 Curt. 856, had stated his conclusion in an even less defensible form:—"The precise form in which the court must pronounce its sentence is this: that the deceased, at the time of his death, was a domiciled subject of France, and that the courts of that country are the competent authority to determine the validity of his will and the succession to his personal estate; and, as in the case of *Hare v. Nasmyth* (1816), 2 Add. 25, the court suspends the proceedings here, as to the validity of the will, till it is pronounced valid or invalid by the tribunals of France." As to the subsequent history of this case in the French courts, see Schreiber, 31 Harv. L. Rev. 523, at p. 538.

separation of the two countries took place, and consequently at the time at which these testamentary documents of Mr. Ryan were executed, they do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium as to the form and execution of a will, as would necessarily be the case with a free, natural born, subject of Belgium; but the successions of persons who, however long they might have been resident not having obtained the royal authority to reside there, being considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the courts of Belgium, if those courts were called on to decide. The court sitting here decides from the evidence of persons skilled in that law, and decides as it would if sitting in Belgium. Therefore I am of opinion that, notwithstanding the domicile of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicile, and had acquired *animo et facto* a domicile in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition, if executed according to the forms required by his own country. I am therefore of opinion that I am bound to decree probate of the will and all the codicils.

In my original article I laid stress on the incongruity between (1) disregarding the evidence of the expert witnesses that the testator was not domiciled in Belgium and (2) giving effect to their evidence that because the testator was domiciled, not in Belgium, but in England or Ireland, the will and codicils made in English form were valid in Belgium (*i*). This incongruity is discussed later in connection with the intrinsic validity of wills of movables (*j*). As regards the formal validity of a will of movables, however, which alone was in question in *Collier v. Rivaz*, I approve of the result of the judgment in that case (*k*), explained in the light of the final sentence of the passage quoted above. There were in fact six codicils. What Jenner J. did was to admit to probate the will and four codicils because they were made in English form, that is, in accordance with the conflict rules of the *lex domicilii*, and two codicils because they were made in Belgian form, that is, in accordance with the domestic rules of the *lex domicilii*. It is submitted that it is quite defensible to construe a reference to the *lex domicilii* alternatively so as to avoid invalidating in point of formalities any will or

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(*i*) In effect, reopening the question of domicile and reversing the court's decision on the first point: cf. Abbott (1908), 24 L.Q. Rev. 133, at p. 146. See also criticism of the decision on various grounds by Schreiber (1918), 31 Harv. L. Rev. 523, at pp. 539-541. Incidentally Jenner J. seemed to ignore the general rule prevalent in continental Europe that formal validity of a will is governed by the law of the place of making.

(*j*) See the discussion of *In re Annesley*, [1926] Ch. 692, in § 6 (4) (d), *infra*.

(*k*) See chapter 9, § 5. The case is also discussed in chapter 8, § 5.

codicil which is intrinsically valid and which admittedly expresses the intention of the testator. Such an alternative mode of construction of a reference to the *lex domicilii*, however, obviously does not support the view that a reference to the *lex domicilii* means a reference to the conflict rules, to the exclusion of the domestic rules, of the *lex domicilii*, and does not therefore support the doctrine of the *renvoi*. Nevertheless the formula stated by Jenner J., namely, that the English court decides the case as if it were sitting in the country of the domicile, has sometimes been treated as going to the root of the whole matter (l), and as being a satisfactory statement of the operation of the doctrine (m).

Furthermore, the court, in applying its own formula, namely, that it should decide the case as if it were sitting in Belgium, must have taken it for granted that a court sitting in Belgium would not itself give effect to the doctrine of the *renvoi*, but would simply apply domestic English law. If it is assumed that when *Collier v. Rivaz* was decided the *renvoi* was unknown in Belgium, the formula adopted by the English court had an appearance of efficacy. If, as appears to be the fact, Belgian courts now recognize the *renvoi*, the formula leads to a dilemma. Either the English court will refuse to take any notice of the recognition of the *renvoi* by the foreign court, and in that event will not actually decide the case as if it were sitting in the foreign country (n), or the English court will take notice of the recognition of the *renvoi* by the foreign court, and, adhering verbally to the formula, will be obliged in applying it to evolve a new and more complicated version of the *renvoi* (o).

(b) *Bremer v. Freeman*.

In *Bremer v. Freeman* (a) the Privy Council affirmed the principle that an English court must decide the question of the domicile of the *de cuius* without regard to any foreign law as to domicile, and decided, against the view of the majority of the French expert witnesses, that the testatrix was domiciled

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(l) So Dicey, Conflict of Laws (5th ed. 1932), appendix, note 1.

(m) So in *In re Ross*, [1930] 1 Ch. 377, at pp. 389-391, quoting an earlier extract from the judgment in *Collier v. Rivaz*.

(n) See Lorenzen (1918), 27 Yale L.J. 509, at pp. 520, 521.

(o) This alternative is discussed in connection with the case of *In re Annesley*, [1926] Ch. 692, in § 6(4) (d), *infra*.

(a) (1857), 10 Moore P.C. 306, on appeal from the Prerogative Court of Canterbury.

in France at the time of her death (*b*). The will in question was made in France in English form, and the testatrix was a British subject of English domicile of origin, who had not obtained any authorization from the government, under article 13 of the Civil Code, to establish her domicile in France. The Prerogative Court of Canterbury, consistently with *Collier v. Rivaz*, held that the will was valid, but the Privy Council refused probate, "having arrived by intricate reasoning at the conclusion that it would not be good in France" (*c*). The reasoning was indeed so intricate that it is difficult to say definitely what the principle of the decision was. There was, on the Privy Council's conclusion as to the French law, no reference back to English law, and therefore no question of the doctrine of the *renvoi*. Probably, though not certainly, the Privy Council applied what it believed to be domestic French law (*d*). Lord Wensleydale said (*e*):

Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law, nor any that the statute of 7 Will. 4 and 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law.

Doubts have been expressed as to the correctness of the Privy Council's view of the French law (*f*), but these doubts may be based on a misapprehension. If the Privy Council intended to apply domestic French law in the strict sense, that is, to decide the question of the validity of the will as if it were the will of a Frenchman domiciled in France, it was clearly right in deciding that the will was invalid, as the will was not made in accordance with the forms of the place of making (France) or the forms of a Frenchman's national or domiciliary law; and on this view *Collier v. Rivaz* as an authority on the *renvoi* was overruled by *Bremer v. Freeman*. Even if the Privy Council intended to apply French rules of the conflict of laws, it was possibly right in holding the will to be invalid, because when

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(*b*) This is indeed the only unambiguous part of the Privy Council's decision.

(*c*) Westlake, *Private International Law* (7th ed. 1925) 36.

(*d*) *Cf. In re Ross*, [1930] 1 Ch. 377, at p. 393.

(*e*) 10 Moore P.C. 306, at p. 359. The passage is quoted in *In re Price*, [1900] 1 Ch. 442, at p. 451.

(*f*) Dicey, *Conflict of Laws* (5th ed. 1932) 821, note (*y*); Bentwich, *Law of Domicile in its Relation to Succession* (1911) 167. See Phillimore, *International Law* (3rd ed. 1889), vol. 4, pp. 225, 240-2, for an account of the unsuccessful effort to introduce, after the decision, further evidence in support of the validity of the will.

the case was decided the facultative character of the rule *locus regit actum* was not well established in France as to wills of foreigners (*g*); and on this view *Collier v. Rivaz* was overruled simply on the facts, that is, on the ground that the court had taken an erroneous view of the foreign law as proved. Bate (*h*) remarks that the case of *Bremer v. Freeman*

stops short just where it begins to be interesting. Had the court come to the conclusion that French law had no rules of succession (testate or intestate) for a foreigner who was domiciled in France without authorisation, the court would have had to say how it would deal with the lacuna. That it would not have applied French rules *malgré* French law seems a logical conclusion for, otherwise, the long discussion as to the effect in France of the absence of authorisation would have been unnecessary.

In any event the result of the decision in *Bremer v. Freeman* was considered so unsatisfactory in England that it led to the passing of Lord Kingsdown's Act (*i*) in 1861. This was pointed out in the argument in *Hamilton v. Dallas* (*j*), which was a case of succession on intestacy, the *de cuius* being a British subject of English domicile of origin, domiciled in fact in France, but without the authorization of the French government under article 13 of the Civil Code. The decision was that legacy duty was not payable in England because of the French domicile of the *de cuius*, a decision that was clearly right if an English court must decide the question of domicile according to English law without regard to the foreign law as to domicile.

Opinions will doubtless continue to differ as to both *Bremer v. Freeman* and *Hamilton v. Dallas*. Bentwich (*k*) and Luxmoore J. (*l*), admit that no question of the *renvoi* arose in either case, but they both express the opinion that the two cases sup-

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(*g*) The *jurisprudence* was divided before 1909; Niboyet, *Manuel de Droit International Privé* (1928), § 553. See also, Lorenzen (1910) 10 *Columbia L. Rev.* 327, at p. 340; Schreiber (1918), 31 *Harv. L. Rev.* 523, at p. 545.

(*h*) Notes on the Doctrine of *Renvoi* (1904) 13; cf. discussion by Schreiber, 31 *Harv. L. Rev.* 523, at pp. 546-7, of the speculative question raised by Bate, inclining to the opinion that the Privy Council was seeking the particular rule of domestic French law applicable to the case.

(*i*) See § 6(2) (c), *infra*, and chapter 23.

(*j*) (1875), 1 Ch.D. 257, at pp. 264-5. The decision of the French Cour de Cassation in the *Forgo* case, referred to in the argument and the judgment, was that of May, 1875, and not, of course, the important decision of June, 1878, pronounced after the decision in *Hamilton v. Dallas*. See § 6(4) (c), *infra*.

(*k*) *Law of Domicile in its Relation to Succession* (1911) 167-8.

(*l*) *In re Ross*, [1930] 1 Ch. 377, at pp. 394-5.

port the view that the English court refers to the whole law of the domicile and decides as the foreign court would decide in the particular circumstances, and that the cases thus indirectly support the doctrine of the *renvoi* (*m*). On the other hand Bate (*n*) and Abbott (*o*) have taken a different view; and Sir Frederick Pollock says (*p*):

It is conceivable, certainly, that there should be a special positive rule of English law that the movable goods of a deceased person ought to be administered in all respects as they would in fact be administered in the local jurisdiction of his domicile. Such a rule might exist, purporting to rest on the ground of ensuring uniform dealing with the whole of the estate (which in practice it would not), and it need not involve any general theory of *renvoi*. We do not believe, however, that there is any such rule, though Lord Westbury, who even suggested that the court of the domicile has exclusive jurisdiction (*q*) might have favoured it.

(*c*) *Lord Kingsdown's Act*.

By s. 1 of Lord Kingsdown's Act, passed in the United Kingdom in 1861 (*a*), it was enacted:

Every will and other testamentary instrument made out of the United Kingdom by a British subject, whatever may be the domicile of such person at the time of making the same or at the time of his or her death shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin (*b*).

It seems fairly obvious that Parliament had in mind cases such as *Collier v. Rivaz* and *Bremer v. Freeman*, and intended to validate wills made in the local forms of the place of making or in the local forms of the domicile of the testator at the time of making or in the local forms of his domicile of origin, without regard to the rule of conflict of laws of any place,

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(*m*) See also W. Jethro Brown (1909), 25 L.Q. Rev. at pp. 149, 150.

(*n*) Notes on the Doctrine of Renvoi (1904) 11-13, 110-111.

(*o*) (1908), 24 L.Q. Rev. 133, at pp. 142-144.

(*p*) In a review of Baty, *Polarized Law* (1915) 31 L.Q. Rev. 106, at p. 107.

(*q*) *Enohin v. Wylie* (1862), 10 H.L.C. 1, 14, 15. Lord Westbury's statement was disapproved in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, at pp. 502 ff.; cf. chapter 8, § 5, note (*o*).

(*a*) See chapter 23.

(*b*) Section 2, relating to wills made within the United Kingdom, is irrelevant to the present discussion. Section 3 has already been quoted in § 4, *supra*.

and it is submitted that when any statute refers a case for decision to the law of any particular country, it should ordinarily be construed as referring to the specific domestic law applicable according to its terms and not as referring to the law which is to furnish the appropriate rule of conflict of laws (c). As applied to the formal validity of acts a reference to the *lex loci celebrationis* should obviously mean *prima facie* the domestic rules of that law so as to permit a person to use the forms which are immediately available or familiar to him at the place where he is, or as to which he can readily procure professional advice there (d).

(d) *In re Lacroix*

It was, however, held by Sir James Hannen in *The Goods of Lacroix* (e), in the case of a naturalized British subject, assumed to be domiciled in France, who made, in France, a will and two codicils in English form, and a confirmatory will in French form (holograph), that the instruments in English form were valid under Lord Kingsdown's Act because they were made in a form recognized by French law as applied to the will of an Englishman. It would appear that the learned judge also considered that the confirmatory instrument in French form was valid, that is, as being made in accordance with the domestic law of France.

Notwithstanding my former disapproval of the decision, and my opinion that Parliament, in passing Lord Kingsdown's Act, intended merely to validate wills made in the local form of any of the three laws specified in the statute, I am now inclined to think that the extreme indulgence shown with regard to the formal validity of wills is justifiable (f).

Bate (g) remarks that the *Lacroix* case, decided on an *ex parte* application, "merely shows how accommodating a judge will sometimes be rather than declare a will to be void in point of form," and that the dictum of Lord Watson in *Abd-*

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(c) Cf., as to the Bills of Exchange Act, chapter 14, § 3(e).

(d) See Niboyet, *Manuel de Droit International Privé* (1928), §§ 543, 554, as to some of the strange results which may follow from the application of the *renvoi* to the forms of acts.

(e) (1877), 2 P.D. 94.

(f) See chapter 9, § 5, for further discussion of the *Lacroix* case.

(g) Notes on the Doctrine of *Renvoi* (1904) 108-109.

*ul-Messih v. Farra (h)* "finally disposes of it." The case last mentioned did not involve the doctrine of the *renvoi*, but Lord Watson's dictum would seem to be adverse to the doctrine. It had been argued that under a certain order in council relating to the consular courts in Turkey British subjects and protected persons domiciled in the Ottoman dominions could make wills only in English form. Lord Watson said:

According to s. 6, they [the consular courts] are to administer the law for the time being in force "in and for England," an expression which simply denotes the law for the time being administered in the Courts of England; and, according to s. 91, they are to have the same jurisdiction in probate as belongs to the English Court of Probate. If this suit had been brought in the Court of Probate here, there can be no doubt that the law applicable would have been that of the testator's domicile; but it was suggested for the appellant that the words "in and for England," must be read as if they had been "in England and for Englishmen." That construction would not avail here, because the testate succession of an Englishman is regulated by his domicile, which may be in France or elsewhere abroad. In order to support the argument, it would be necessary to make the gloss run thus, "in England and for Englishmen domiciled there." The suggestion has hardly the merit of plausibility, seeing that it involves the necessity of adding to the otherwise plain language of the enactment words which have the effect of giving it a totally different meaning.

### (3) Cases A(2) (3), C(3): *Formal Validity of Will.*

Several cases should be mentioned because they are sometimes cited as supporting the doctrine of the *renvoi*, though some of them do not seem to throw much light on the doctrine.

*Anderson v. Laneuville (i)* was cited in *Bremer v. Freeman (j)* in support of the principle that a person can be domiciled, in the English sense, in France without French government authorization. In the former case the Privy Council affirmed a decree of the Prerogative Court of Canterbury finding that the testator was domiciled in France at the time of his death and at the time of his making, in France, a will in French form (holograph). The result was to uphold the validity of the will. This is an example of Case A(2) in the classification of hypothetical cases already stated (*k*). and, if it has any

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(h) (1888), 13 App. Cas. 431, at p. 442.

(i) (1854), 9 Moore P.C. 325; subsequent proceedings relating to the appointment of an executor in England are reported in *Laneuville v. Anderson* (1860), 2 Sw. & Tr. 24; cf. *Hood v. Lord Barrington* (1868), L.R. 6 Eq. 218, at p. 224.

(j) (1857), 10 Moore P.C. 306, at p. 374. As to *Bremer v. Freeman*, see § 6(2) (b), *supra*.

(k) See § 6(1), *supra*.

bearing on the doctrine of the *renvoi*, is adverse to it, because the will was valid by the domestic law of the domicile.

*The Goods of Brown-Sequard* (1) is an example of Case A(3), that is, the case of a testatrix of English domicile of origin, domiciled in the English sense in France at the time of her death, who makes in England a will in English form. This will was not made in any form permitted by the domestic law of France, but was held to be valid because on the evidence it would be operative in France as being the will of a person who "was, by French law, an Englishwoman." The words quoted refer to the fact that the husband of the testatrix had been naturalized in France, but that by French law his naturalization did not make her a French citizen. The case supports the *renvoi* to the extent that the reference to the law of the domicile was construed as including the conflict rules of the domicile, but inasmuch as a will in domestic French form would also have been valid (m), the case merely illustrates the special indulgence shown to wills, in point of form, already discussed in connection with *Collier v. Rivaz* (n) and *In re Lacroix* (o).

*Crookenden v. Fuller* (p) is sometimes cited, but is not helpful with regard to the *renvoi*. A testatrix of English domicile of origin resident in France received a letter from her English solicitor expressing his doubt as to the validity of her will, made in England in English form, in view of the recent decision of the Privy Council in *Bremer v. Freeman*. She replied that the absurdity of the view taken by the Privy Council was "apparent to the meanest capacity," and during a subsequent visit to England made another will in English form. The decision, that the later will was valid, was clearly right, as it was held that the testatrix was domiciled in England at the time of her death. Alternatively, if she was domiciled in France, the evidence of a French lawyer was that the will would be valid, just as would be valid any will made in Eng-

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(1) (1894), 70 L.T. 811.

(m) See *Anderson v. Laneville*, *supra*.

(n) See § 6(2) (a), *supra*.

(o) See § 6(2) (d), *supra*.

(p) (1859), 1 Sw. & Tr. 441; *cf. Onslow v. Cannon* (1861), 2 Sw. & Tr. 136, which, though sometimes cited, seems to decide nothing as to the *renvoi*, the point conceded in the case being that a will made abroad in accordance with the *lex loci actus* was valid even if it were proved that the testator was domiciled in Scotland.

land in English form by any domiciled Frenchman. This is an example of Case C(3), and, the *obiter dictum* of the court that the will would have been valid if the testatrix had been found to be domiciled in France obviously means that the court was willing to construe the reference to the law of the domicile as including the conflict rules of the domicile. It may be safely assumed, however, that the court would have upheld a will made in French form in accordance with the domestic rules of the French domiciliary law, as in *Anderson v. Laneuville*. In other words, as regards the formal validity of a will, a reference to the law of the domicile includes alternatively, either the domestic rules or the conflict rules of that law (q).

(4) Cases A(5) (6): *Intestacy or Intrinsic Validity of Will.*

Leaving, for the time being, cases relating to the formal validity of a will of movables, we come now to cases relating to the disposing power of a testator or the construction and legal effect of a will or relating to succession on intestacy. There is, in the first place, what may be called Case A(5) in the classification of hypothetical cases already stated (a). This is the case of a testator, in the situation described in A (that is, a British subject of English domicile of origin, domiciled in the English sense in France at the time of his death, and domiciled in fact in the French sense in France, but without having obtained under article 13 of the French Civil Code the authorization of the French government to establish his domicile in France), who has made a will valid in point of form by both French law and English law, and intrinsically valid by English law but intrinsically invalid, at least in part, by French law. It is exactly the situation which arose in *In re Annesley* (b), and, subject to one important difference, was substantially the case which arose at an earlier date in *In re Trufort* (c). The case would be essentially similar if the question were one of the construction or legal effect of a will, as it was in *Re Tallmadge* (d). Again, Case A(6), that is, the case of a person,

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(q) See the discussion of the *Brown-Sequard* case, *supra*, and the cross-references there given.

(a) See § 6(1), *supra*.

(b) [1926] Ch. 692.

(c) (1887), 36 Ch.D. 600.

(d) *Re Tallmadge, Re Chadwick's Will* (1919), 181 N.Y. Supplement (215 N.Y. State) 336; S.C. 109 Misc. Rep. (N.Y.) 696, 62 New

in similar circumstances, dying intestate, would be governed by the same principles, and was possibly the case which arose in *In re Johnson* (e). As has been already pointed out (f), all three classes of questions, (1) the intrinsic invalidity of a will by reason of limitations imposed by law upon the disposing power of the testator, (2) the construction or legal effect of the will, and (3) succession on intestacy, are by French rules of the conflict of laws governed, as to movables, by the law of the domicile of the testator, although the application of these rules was before August 10, 1927, complicated by the existence of article 13 of the French Civil Code. It is proposed first to refer to the *Trufort* and *Johnson* cases, then to consider what is the attitude of the French courts with reference to the doctrine of the *renvoi*, and then to proceed to the discussion of the *Annesley* case.

(a) *In re Trufort*

The case of *In re Trufort* (g), as reported, has some peculiar features which make it a rather doubtful authority for general application as to the doctrine of the *renvoi*. The testator left movables in England, Switzerland and elsewhere, and made a will purporting to give the property to the defendant. The plaintiff, as the only son of the testator, claimed 9/10 of the property as his compulsory portion. Two questions were chiefly contested, (a) as to the legitimacy of the plaintiff, and (b) as to the law which should govern the testator's disposing power, and therefore the succession. According to the statement of facts (h) it was not disputed that the testator's domicile at the time of his death was French, and that according to the law of France the right of succession to the movables of a foreigner (as the testator was in France)

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York Law Journal 215; cf. 29 Yale Law Journal 214 (1919), 19 Columbia Law Review 496 (1919); 36 Law Quarterly Review 91 (1920). The testator was an American citizen of New York domicile of origin dying domiciled (in the English sense) in France, but apparently without the authorization of the French government. The Surrogate's Court of New York County confirmed a report of Winthrop, Referee, by which domestic French law was applied to determine the effect of the death, during the lifetime of the testator, of one of two legatees to whom the residue was given, share and share alike.

(e) [1908] 1 Ch. 821.

(f) See §§ 3 and 4, *supra*.

(g) *In re Trufort, Trafford v. Blanc* (1887), 36 Ch.D. 600.

(h) 36 Ch.D., at pp. 603-4.

was governed by the law of his nationality; and by virtue of a treaty between France and Switzerland the succession to the movables of a Swiss subject dying domiciled in France was determined according to the law and by the tribunals of Switzerland. When the case came before an English court it was proved that the testator was of Swiss nationality at the time of his death and that a competent Swiss court had given judgment in favour of the plaintiff, and Stirling J. accordingly held that by virtue of the judgment in Switzerland the plaintiff was entitled in England to 9/10 of the estate (*i*).

According to Bate (*j*) the decision, when generalized, means that if English rules of the conflict of laws refer a matter to a foreign law A, and A in its turn refers the matter to a foreign law B, which accepts the reference, the English courts will apply the law of B—English law paying “a common-sense homage to accomplished facts in which it is not personally interested,” and making “a prudent compromise” at the expense of its own rules of its conflict of laws. He adds:

The *Weiterverweisung* admitted in *Re Trufort*, affords not the least pretext for the admission of *Rückverweisung*. In the former, the English court applies its rules of [conflict of laws], but with a liberal interpretation thereof; the latter means that the English court repudiates its rules directly a foreign judge is pleased to be displeased with them and that a foreign law which is called as a witness is allowed to sit as a court of appeal.

The peculiar features of the *Trufort* case are these. The Swiss court, in default of express provisions of the Swiss Code, did in fact consult French law (*k*), and it would appear that the case might have been decided in the same way by reference to domestic French law as such. Furthermore, the statement that by French law the testator's national law governed the case may have been justified by the existence of the treaty between France and Switzerland, but is more than doubtful as a general statement of French conflict of laws. As already pointed out the French rule of the conflict of laws is that any question as to the disposing power of a testator is governed by the law of his domicile. This raises the further question whether the testator was domiciled in France with government authorization. If, as appears probable in view of the silence

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(*i*) An example, says Abbott, not of *renvoi* but of *res judicata*: 24 L.Q. Rev. 133, at p. 142; *sed cf.* Schreiber, 31 Harv. L. Rev. 523, at pp. 550-3.

(*j*) Notes on the Doctrine of *Renvoi* (1904), pp. 112-4.

(*k*) 36 Ch.D., at p. 618.

of the report, he was not so domiciled, then, although he may have been domiciled in France in the English sense, he was not legally domiciled there in the French sense, and the English court, disregarding the French law as to domicile and its consequences, ought logically to have applied domestic French law (*l*).

(b) *In re Johnson*

The much debated case of *In re Johnson* (*m*) raises more questions than it solves. The testatrix was, or was at least found to be, a British subject. She was born out of wedlock in Malta in 1810, her father being a British subject domiciled in England and her mother being domiciled in Malta. Her parents intermarried in 1815. She left Malta in 1832 or 1833, and died in 1894 domiciled in the Grand Duchy of Baden. She made a will, but it contained no residuary bequest, and there was therefore a partial intestacy as to movables left by her in England and in Baden. The question being who were entitled to her undisposed-of-movables, it was found by a master that she had not been "legally naturalized" in Baden, and that "according to the law of Baden her will was valid, but the legal succession to that part of her property which she had not disposed of by will was governed by the law of the country of which she was a subject at the time of her death." It was held by Farwell J. that the undisposed-of movables should be distributed according to the law of Malta, that is, the law of the domicile of origin of the testatrix.

The judgment was based upon two alternative lines of reasoning. The first was that a domicile of choice was not effectually acquired in Baden, and consequently that the domicile of origin in Malta was not effectually abandoned, because the law of Baden (the domicile in the English sense) refused to recognize the testatrix as being domiciled in Baden and in effect refused to have anything to do with the case. This line of reasoning, which was followed without discussion in *In re Bowes* (*n*), was inconsistent with earlier cases, and since its condem-

(l) Cf. the discussion of *In re Annesley* in § 6(4)(d), *infra*.

(m) *In re Johnson*, *Roberts v. Attorney-General*, [1903] 1 Ch. 821. In addition to the articles and notes mentioned below, see Lorenzen, 10 Columbia L. Rev. 327, at pp. 335-8; Boddington, 120 Law Times 237 (Jan. 13, 1906); Sewell, 27th meeting, International Law Association (1912) 334; Bate *op. cit.* (note (g), *supra*) 343. See also the further discussion of the *Johnson* case in chapter 9, § 4, in connection with *In re O'Keefe*, [1940] Ch. 124.

(n) (1906), 22 Times L.R. 711.

nation in *In re Annesley* (o) may be safely disregarded. It is submitted, however, that the implications of the condemnation of this line of reasoning have not been generally appreciated, and that the result is adverse to the doctrine of the *renvoi* in most of the cases in which that doctrine is supposed to have been recognized (p).

The second alternative line of reasoning in the *Johnson* case was that the English court should distribute the estate as the Baden court would have done, that is, by applying, or trying to apply, the national law of the testatrix. Here the difficulty was that her nationality was British, and there was and is no such thing as a national private law of the British Empire (q). For the Baden court the reference to the national law would probably mean a reference to English law, but Farwell J. thought it should be interpreted as a reference to the law of that part of the British dominions in which the testatrix had her domicile of origin. In other words the reference back from Baden law to English law was to be interpreted as a reference not to domestic English law but to the law of that part of the British dominions designated by English law as the appropriate law.

What Farwell J. would have decided if the domicile of origin of the testatrix had been Italian must remain a mystery. On his first line of reasoning he would have had to apply domestic Italian law, and on his second line of reasoning he would presumably have applied domestic English law. Again, if the nationality of the testatrix had been French at the time of her death, and her domicile of origin Maltese, on his first line of reasoning he would have applied domestic Maltese law and on his second domestic French law (r). The case is a striking example of the kind of quicksand into which anyone may fall who follows the by-paths of the *renvoi* in search of a rational result. As compared with the simple application of domestic Baden law to the succession, the only alternative which had theretofore received any recognition in English cases

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(o) [1926] Ch. 692.

(p) See especially the discussion of *In re Annesley* in § 6(4) (a), *infra*.

(q) The ambiguity of a reference by a foreign conflict rule to the national law of a British subject is discussed in chapter 9, § 4.

(r) As to the last point, see W. Jethro Brown (1909), 25 L.Q. Rev. 145, at pp. 150-1; Bentwich, *Law of Domicile in its Relation to Succession* (1911) 171.

was to distribute the assets exactly as the Baden court would have done in the particular case.

Farwell J. in effect attributed to the Baden court a reference to a law of which it would probably never have thought, and distributed the estate according to the law of a country which the testatrix had definitely abandoned more than 60 years before her death. Even from a practical point of view the result was absurd. Dicey, "writing so to speak on the spur of the moment," criticized the case vigorously, and pointed out several reasons for doubting whether the case could, until affirmed by the House of Lords, be considered part of the law of England (s). Sir Frederick Pollock was at first inclined to approve of the decision in its result (t), but on mature consideration came to the conclusion that neither of Farwell J.'s lines of reasoning is tenable, and that the estate ought to have been distributed according to the domestic law of Baden (u).

*In re Johnson* was based upon what was, or rather what was supposed to be (v), the law of Baden at the time of the death of the testatrix. A similar case might arise in relation to some foreign country having a rule of the conflict of laws the same as that of Baden was found to be, but could not arise again in relation to Baden or any other territory governed by the German Civil Code, which came into force on January 1, 1900. That Code now provides, in its Introductory Act, by article 25 that if a foreigner had his residence (*Wohnsitz*) in Germany at the time of his death, the succession to his movables shall be governed by the law of the state of which he was a national at that time, and by article 27 that if by the conflict rules of his national law, the law of Germany is to be applied, the domestic rules of the law of Germany shall be applied (w). The result in the *Johnson* case, if it arose now, would therefore be that domestic German law would be applied,

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(s) (1903), 19 L.Q. Rev. 244; see also Bate, Notes on the Doctrine of Renvoi (1904) 19 ff., 115 ff.; Schreiber (1918), 31 Harv. L. Rev. 523, at pp. 554-7.

(t) 19 L.Q. Rev. at p. 246.

(u) (1920), 36 L.Q. Rev. 91, at p. 92.

(v) As stated in a master's certificate which was binding on the parties because there had been no summons to vary: [1903] 1 Ch. 821, at p. 826.

(w) As to the terms and effect of article 27, see § 7(1) of the present chapter, *infra*. References are given there to books and articles relating to the *renvoi* in German law.

It is doubtful, however, whether the law of Baden was accurately or sufficiently stated in the master's certificate in the *Johnson* case (*x*). Before the adoption of the German Civil Code "the Badenens lived under a translated and slightly modified version" of the French Civil Code (*y*), and if that version contained a provision similar to article 13 of the French Civil Code, the case may have been really similar to other cases already discussed, in which the *de cujus* was domiciled in the English sense in France, but not legally domiciled there in the French sense because of non-compliance with article 13 (*z*).

(c) *The French Courts and the Renvoi*

The attitude of the French courts to the *renvoi* has been chiefly determined by the decision of the Cour de Cassation in the *Forgo* case (*a*)—a decision which has been much criticized in France, but which has been followed by other French courts to such an extent that there may be said to be a *jurisprudence constante* to the same effect. The decision, dated June 24, 1878, was the sequel of an earlier decision in the same case.

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(*x*) So, Foote, *Private International Law* (5th ed., 1925) 302, note (s), without, however, any hint as to what was inaccurate or insufficient in the statement. Bentwich, *op. cit.*, p. 170, remarks, "It is said that at this period the law of Baden was opposed to the *renvoi* (cf. Niemeyer, 134)."

(*y*) Maitland, *Collected Papers*, vol. 3, p. 478.

(*z*) *In re Johnson* is so stated by Abbott in 24 L.Q. Rev. 133, at pp. 144-5, but the present writer has no means of verifying the conjecture made in the text. It appears that Baden so early as 1808 adopted the rule that succession is governed by the national law of the *de cujus*, and thus led the way in the movement (which made great progress in the course of the 19th century in continental Europe) in favour of the substitution of the national law for the *lex domicilii* as the governing law for this purpose: Lewald, *Das deutsche internationale Privatrecht* (Leipzig, 1931) 285-286; Répertoire de Droit International, vol. VII (Paris, 1930) 377.

(*a*) *Affaire Forgo*, Sirey (1878) 1, 429; Dalloz (1879) 1, 56; Clunet (1883) 64; discussed in Pillet, *Traité Pratique de Droit International Privé* (1923), vol. 1, § 251; Niboyet, *Manuel de Droit International Privé* (1928) §§ 286, 403, 735, with numerous references to later decisions and discussions by text-writers, notably Potu, *La question du renvoi en droit international privé* (Paris, 1913), and articles by Lainé, *La théorie du renvoi en droit international privé*, Rev. dr. int. pr. 1906, pp. 605-643, 1907, pp. 43-72, 313-339, 661-674, 1908, pp. 729-758, 1909, pp. 12-40; cf. French Rules of Conflict of Laws by Lorenzen (1927), 36 Yale L.J. 731, at pp. 733-4. For a more recent analysis and criticism of the *Forgo* case and of the doctrine of the *renvoi*, see Bartin, *Principes de Droit International Privé* (Paris, 1930) 200 ff. See extracts from Bartin, translated into English, in 169 Law Times, pp. 147-8, 172-3.

dated May 5, 1875, which is also of interest for the present purpose. The *de cujus* Forgo was a natural child, of Bavarian domicile of origin and nationality, whom his mother had taken to France at the age of five years. He lived all the rest of his life in France, but without having obtained the authorization of the French government to establish his domicile in France (*b*), and died there at the age of 68, intestate, leaving movables. If domestic Bavarian law applied, the natural brothers and sisters of Forgo were entitled, whereas if domestic French law applied, the French Treasury was entitled in default of next-of-kin.

The *lex domicilii* being the governing law, and the court below having therefore decided to distribute the estate according to French law, the Cour de Cassation decided, on May 5, 1875, that Forgo, although domiciled in fact in France was not, because of lack of government authorization, under article 13 of the Civil Code, really domiciled there in the sense of having a legal domicile there with the juridical consequences attached to such legal domicile. The result was that in one important field, namely, succession to movables, legal domicile, as distinguished from domicile in fact, remained the governing factor, although the importance of legal domicile was much diminished by the fact that for various other purposes the *jurisprudence* somewhat illogically recognized the validity and sufficiency of a domicile in fact (*c*).

It having been thus decided that according to the existing law, Forgo was not legally domiciled in France, and therefore had not lost his Bavarian domicile of origin, it seemed that there was nothing left to do but to distribute the estate in accordance with the Bavarian law relating to intestate succession. At this point the representatives of the French government advanced the argument that the case should be governed by French law because according to Bavarian law the case was governed by the law of the domicile in fact of the *de cujus*, that is, by French law. This argument was rejected by the court below, but was accepted by the Cour de Cassation, which on June 24, 1878, decided as follows:

Suivant le droit bavarois les meubles sont régis, en matière de succession, par la loi du domicile de fait ou de la résidence habituelle du défunt. Il suit de là que la dévolution héréditaire des biens

(b) Under article 13 of the French Civil Code, as to which see § 5, *supra*.

(c) See Niboyet, *op. cit.*, § 286.

meubles que Forgo possédait en France, où il s'était fixé, doit être régie par la loi française (d).

In other words, although the Cour de Cassation had decided in 1875 that Forgo was not legally domiciled in France and that his domicile in fact in France was not a sufficient basis for the application of French law, it decided in 1878 that after all French law was applicable by reason of Forgo's domicile in fact in France joined with the Bavarian rule of the conflict of laws that succession to movables was governed by the law of the domicile in fact. The court below was, in effect, directed by the second decision to do exactly what it had been prevented from doing by the first decision. As Niboyet observes (e) "Il est même assez piquant de rapprocher les deux arrêts de cassation du 5 mai 1875 et du 24 juin 1878, intervenus dans l'affaire Forgo. Le premier a cassé l'arrêt d'appel parce qu'il avait soumis la succession à la loi française; le second a encore cassé parce que la cour de renvoi avait cette fois appliqué la loi bavaroise. On aboutissait vraiment à l'incohérence avec le renvoi." It should be noted in conclusion, that since the repeal of article 13 of the French Civil Code, a person in the position of Forgo would be held in France to have been domiciled there, and his movables would of course be distributed in accordance with domestic French law (f).

The question of the *renvoi* in matters of succession to movables came again before the Cour de Cassation in 1910 in the *Soulié* case (g). This was the case of an American citizen who died domiciled in fact in France, but without government authorization and therefore still retaining, from the French point of view, her domicile of origin in Louisiana. In spite of the importance of the question, and the great mass of writing on the subject published since the *Forgo* case, and the opportunity that was consequently afforded for a real re-examination of the whole problem and its consequences, the application in the *Soulié* case did not even reach the *chambre civile* of the Cour de Cassation which had decided the *Forgo* case, but was dismissed by the *chambres des requêtes*. By virtue of the doctrine of the *renvoi* French law was consequently applied, apparently for no better reason than that the *renvoi* from the law of

(d) Niboyet, *op. cit.*, § 403.

(e) Niboyet, *op. cit.*, § 735, p. 851, note (2).

(f) Niboyet, *op. cit.*, § 735.

(g) *Affaire Soulié*, Rev. dr. int. pr. (1910) 870; Clunet (1910) 888; Sirey (1913) 1, 105; Dalloz (1912) 1, 262.

Louisiana to domestic French law did no injury to French private international law and that it was all to the good that conflict should be thus avoided and that domestic French law should govern interests arising on French territory (*h*). Further comment on this manner of disposing of an important question of principle seems superfluous.

It thus appears, that on two occasions the Cour de Cassation has recognized the doctrine of the *renvoi*, in the same field of succession to movables. Lower courts have applied the doctrine to a great variety of other matters, but the French courts have not yet admitted the *renvoi* to the second degree, that is, the sending on of a case to the law of a third country (*Weiterverweisung*), as was done in England in *In re Trufort* (*i*) as distinguished from the sending back of a case to the law of the country in which the case rises (*Rückverweisung*) (*j*).

(*d*) *In re Annesley*

Against the background of French law which has just been sketched let us now consider the important and interesting case of *In re Annesley* (*k*), decided by Russell J. (afterwards Lord Russell of Killowen). The testatrix, Mrs. Annesley, a British subject of English domicile of origin, was undoubtedly permanently settled in France at the time of her death. She was held to have acquired a domicile of choice in France notwithstanding that (a) she had expressly declared that she did not intend to abandon her English domicile of origin, and (b) she had not obtained, or even applied for, the authorization of the French government under article 13 of the Civil Code. Fact (a) was rightly disregarded, in view of the other evidence of her *animus manendi*. Fact (b) was also disregarded, and the cases of *In re Johnson* (*l*) and *In re Bowes* (*m*) were disapproved in so far as they had held that a person could not be domiciled in the English sense in another country the law of which did not recognize him as being domiciled there or as

(*h*) See Niboyet, *op. cit.*, § 403.

(*i*) (1887), 36 Ch. D. 600; see § 6(4) (a), *supra*.

(*j*) Cf. Niboyet, *op. cit.*, §§ 400, 403.

(*k*) *In re Annesley*, *Davidson v. Annesley*, [1926] Ch. 692; noted (1926), 36 Yale L.J. 114; (1926), 40 Harv. L. Rev. 316; (1926), 25 Michigan L. Rev. 174; (1926), 42 L.Q. Rev. 435; (1927), 43 L.Q. Rev. 265.

(*l*) [1903] 1 Ch. 821; see § 6(4) (b), *supra*.

(*m*) (1906), 22 Times L.R. 711.

being other than a foreigner there (*n*). Conversely, the doctrine established by earlier cases was reaffirmed, that an English court must decide the question of domicile upon the facts as proved (as to *factum* and *animus*) in accordance with English law and without regard to the law relating to domicile of the country of domicile (*o*). This point may seem elementary and sound, but, as will presently appear, it is not so simple as it seems, and is not clearly severable from the ultimate ground of decision of the *Annesley* case.

The ground having been cleared by the finding that the testatrix was domiciled in France at the time of her death, the question which remained for decision was whether the intrinsic validity of the will was governed by English law, which did not limit the disposing power of the testatrix, or by French law, which limited her disposing power to 1/3 of her movables, because she left two children surviving her. By her will she purported to dispose of the whole of her movables.

Russell J. put the case in this way (*p*):

I accordingly decide that the domicile of the testatrix at the time of her death was French. French law accordingly applies, but the question remains: What French law? According to French municipal law, the law applicable in the case of a foreigner not legally domiciled in France is the law of that person's nationality, in this case British. But the law of that nationality refers the question back to French law, the law of the domicile, and the question arises, will the French law accept this reference back, or *renvoi*, and apply French municipal law?

Even if we remove one difficulty by assuming that "French municipal law" where it first occurs in the paragraph just quoted means or includes French rules of the conflict of laws, and where it secondly occurs means domestic French law, other difficulties remain for discussion.

Assuming that the French conflict rule referred the question to the national law of the testatrix, that is, "British" law, Russell J. seemed to be unaware of the hiatus implicit in his statement that the law of the nationality referred the question back to French law. There being no general "British" law, either domestic rules or conflict rules, with regard to succession

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(*n*) This proposition constitutes a rejection of the *désistement* theory, discussed in chapter 2, § 1(5).

(*o*) On this point, see *Bremer v. Freeman* (1857), 10 Moore P.C. 306, in § 6(2) (*b*), *supra*.

(*p*) *In re Annesley*, [1926] Ch. 692, at pp. 706-707.

to movables, the supposed reference by the French conflict rule to the national law of the testatrix was meaningless (*q*).

In fact, however, Russell J. entirely misstated the relevant French conflict rule. As has been pointed out earlier in the present chapter (*r*) the French conflict rule is that succession to movables, including any limitations imposed by law upon the disposing power of a testator, is governed by the law of the domicile of the *de cujus*, in perfect verbal agreement with the corresponding English conflict rule. The French rule referred the question to English law, not on the untenable ground that English law was the national law of the testatrix, but because English law was the law of her domicile, she being according to French law still legally domiciled in England. In other words, the only difference between English and French conflict rules as applied to the specific case was that Mrs. Annesley was domiciled in the English sense in France and in the French sense in England.

Russell J. had, however, already devoted a large part of his judgment to showing that an English court must decide for itself where the domicile of the testatrix was and that the French view on this point was irrelevant in any English court, and logically the judgment should have ended with the finding that the testatrix was domiciled in France, because from this finding it should follow as a matter of course that the case would be governed by domestic French law.

On the other hand, to make the finding of a French domicile the starting point for a new enquiry as to the French law as applied to the specific case meant simply that Russell J., in effect, was setting up for reconsideration the French law as to the domicile which he had already decided was irrelevant. His mode of reasoning was plausible only because he stated the French rule as if it referred to the national law, as such, of the testatrix. The rule of French law which referred the case to English law was a mere consequence of, and not severable from, the rule of French law which refused to recognize the French domicile of the testatrix. In either case, when the English court decided in favour of the foreign domicile notwithstanding the foreign rule of law to the contrary, it destroyed

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(*q*) See chapter 9, § 4, for a discussion of the meaning, or lack of meaning, of a reference by a foreign conflict rule to the national law of a British subject.

(*r*) See § 4, *supra*.

all foundation for any further reference from the foreign law to English law because the only reference that there could have been was predicated upon the English domicile of the *de cuius*.

It is unnecessary in this place to discuss further the exact process by which Russell J. in effect referred to the French conflict rule, found in it a reference to English law, and finally decided that a French court would accept a further reference back to French law and apply domestic French law, and consequently that an English court should apply domestic French law. As is explained in a later chapter (s), the *Annesley* case is one of a series of judgments of single judges in which a doctrine of total *renvoi* is expounded. That is to say, the English court attempts to give effect to the foreign conflict rule as it would be applied by the foreign court, including whatever theory of the *renvoi* prevails in the foreign law. If the foreign court applied the same theory of total *renvoi*, no logical solution would be possible, but, this difficulty does not exist between England and France because, as found in the *Annesley* case, French law adopts a theory of partial *renvoi*, that is, a French court, upon being referred to English law, is willing to accept a reference back and apply domestic French law.

One redeeming feature of the judgment is that Russell J., having reached the conclusion that domestic French law was applicable, stated his own personal opinion in the following words (t):

Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of *renvoi* need be encountered at all. When the law of England requires that the personal estate of a British subject who dies domiciled according to the requirements of English law, in a foreign country, shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicile, while the law of the country of domicile in turn invokes the law of the country of nationality, and I am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York (u).

(s) See chapter 9, § 1. See also chapter 8, § 5.

(t) *In re Annesley*, [1926] Ch. 692, at pp. 708-9.

(u) *Re Tallmadge* (1919), 62 New York Law Journal 215. See § 6(4), *supra*, for a note of the decision and references to other reports of the case.

(5) Cases B(5), C(5), D(5): *Intestacy or Intrinsic Validity of Will.*(a) *Repeal of Article 13 and In re Annesley*

Certain important consequences follow from the repeal of article 13 of the French Civil Code on August 10, 1927 (a). If a new *Annesley* case were to come before the courts, that is, a case like *In re Annesley* with the exception that the Civil Code does not now provide for an authorized or legal domicile in France, as distinct from a domicile in fact, the case would be decided in the same way in the result, but without raising any question of the *renvoi*. Mrs. Annesley would be held to have been domiciled in France both by English law and by French law, and the English and French rules of the conflict of laws would concur in referring the question to domestic French law as being the law of the domicile. The case, instead of being an example of Case A(5), would be an example of Case B(5), in the classification of hypothetical cases already stated (b).

If, however, instead of the case being, as it was, a strong case in favour of the abandonment of the English domicile of origin and the acquisition of a French domicile of choice, it were a weak case, as, for example, the case of an actual residence in France of considerable duration, but not so clear as the *Annesley* case with regard to the testator's *animus manendi*, it might easily happen that it would be held in England that the English domicile of origin had not been lost and held in France that a French domicile had been acquired. Before the repeal of article 13, each country would have applied domestic English law on the basis of the English domicile of the testator, his domicile in France being regarded in France as at most a domicile in fact, but not as a legal domicile. This would be an example of Case C(5). Since the repeal of article 13, there might be a conflict as to domicile, but there would be no question of the *renvoi*; the English court would apply domestic English law on the basis of an English domicile, while the French court might find a French domicile, and if it did so, would apply domestic French law (c). This would be an example of Case D(5).

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(a) See § 4, *supra*.

(b) See § 6(1), *supra*.

(c) On the point that a French court will more easily than an English court find that a person of English domicile of origin has ac-

It appears therefore that as between England and France the opportunities for the spinning of legal cobwebs in connection with the *renvoi* are notably diminished by the repeal of article 13, because English law and French law were already in agreement in referring questions of succession to movables to the *lex domicilii* and their respective views as to domicile are now much less dissimilar than they formerly were. It is submitted, as a result of the preceding discussion, that the doctrine of the *renvoi* originally received some measure of recognition in English law chiefly if not only in connection with cases which turned upon article 13. It appears, however, notwithstanding that cases similar to those in which the doctrine was originally invoked are not so likely to arise, that there is grave danger that the doctrine will be made a general rule, so to speak, and be applied to other and dissimilar cases.

(b) *In re Ross*

47 The case of *In re Ross* (d), like *In re Annesley*, related to the question of the intrinsic validity of a will admittedly valid in point of form, but in several essential particulars the two cases were different. As in the *Annesley* case, so in the *Ross* case, the testatrix, a British subject of English domicile of origin died domiciled in the English sense in a foreign country, but in the *Annesley* case the law of the foreign country (France) refused to recognize the foreign domicile of the testatrix as a legal domicile and regarded her as being still a domiciled Englishwoman, whereas in the *Ross* case the law of the foreign country (Italy) made no difficulty about the acquisition of a domicile in that country, and there is no reason to suppose that the testatrix was not domiciled in Italy in the Italian sense. On the other hand, in the *Annesley* case French law referred to English law as the governing law because it was the law of the country in which the testatrix was domiciled in the French sense (e), whereas in the *Ross* case Italian law referred the question of the validity of the will to the national law of the testatrix, notwithstanding that she was domiciled in Italy. Furthermore, in the *Annesley* case it was found by Russell J. that French law would accept the reference back from English law and apply

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quired a French domicile, see Niboyet, *Manuel de Droit International Privé* (1928), § 410, p. 498. See also § 5, *supra*.

(d) *In re Ross*, *Ross v. Waterfield*, [1930] 1 Ch. 377.

(e) Although, as already pointed out, Russell J. inaccurately stated that French law referred to the national law of the testatrix.

domestic French law, so that the decision was the same as if Russell J. had disregarded the doctrine of the *renvoi* and followed his own preferred "direct route" to the domestic French law, whereas in the Ross case it was found by Luxmoore J. that Italian law would not accept the reference back from the national law of the testatrix (*f*), and consequently he was obliged to choose between the alternatives of applying domestic Italian law on one theory of the meaning of the English conflict rule and of applying domestic English law on another theory of the meaning of the English conflict rule.

We have, therefore, in the Ross case, a superficially simple situation requiring the acceptance or the rejection of the doctrine of the *renvoi* by an English court, namely, a testamentary disposition valid by English law, and invalid by Italian law, the latter being the proper law by English conflict of laws, and the former being alleged to be the proper law by Italian conflict of laws. There was no difficulty as to the domicile as there was in the *Annesley* case, and there was equally no room for the application of Russell J.'s formula, namely, that the English court should apply the foreign domestic law if it should appear that the foreign law would accept the *renvoi*. Luxmoore J., in the Ross case, considered that he ought simply to apply the *Collier v. Rivaz* formula (*g*), namely, that he should decide the case as if he were an Italian court sitting in Italy, and on the evidence of Italian expert witnesses that an Italian court would apply domestic English law, he applied the same law. He therefore held the will to be valid, although it disposed of the property of the testatrix in disregard of the claim which her son (an only child) would have had to one-half of her property as his *legitima portio* under domestic Italian law. As

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(*f*) The finding of Luxmoore J. was in accordance with the settled practice of Italian courts and the great majority of Italian writers. Rabel, *Conflict of Laws: a Comparative Study* (1945) 79-80; cf. *Répertoire de Droit International* (Paris, 1930), vol. 6, pp. 503-504. In the 1931 draft of a new Civil Code there was a provision favourable to the doctrine of the *renvoi*, but in article 20, disp. prel. of the Code of 1939 it was specifically provided that under a reference to a foreign law, the provisions of the foreign law were to be applied without regard to any reference by that law to any other law. Lewald, *Règles Générales des Conflits de Lois* (Bâle, 1941) 52. This statutory negation of the doctrine of the *renvoi* was expressly confirmed by article 30, disp. prel. of the Civil Code of 1942. Rabel, *op. cit.*, p. 131; Morelli, *Elementi di Diritto Internazionale Privato Italiano* (Naples, 1946) 55.

(*g*) See § 6(2) (a), *supra*.

is explained in a later chapter (*h*), the *Annesley* case and the *Ross* case are two of a series of decisions of single judges in which a theory of total *renvoi* is expounded.

The simplicity of the situation in the *Ross* case was, however, superficial, not real. The reference by the Italian conflict rule to the national law of the testatrix was construed by Luxmoore J. as a reference to English law, but there appears to be no justification for so construing the reference and the evidence of the witnesses was unsatisfactory and based on misunderstanding. It is probable that witnesses who were fully informed with regard to the existence of a multiplicity of systems of private law within the British Empire would say that the reference to the national law of a British subject domiciled in Italy is meaningless and therefore that in the actual situation of the *Ross* case an Italian court would apply domestic Italian law (*i*).

#### (6) *Case B(1) (3): Formal Validity of Will.*

Most of the cases relating to the formal validity of a will of movables already discussed arose from situations created by article 13 of the French Civil Code, that is to say, the testators were domiciled abroad in the English sense, but were not domiciled abroad in the eyes of the foreign law. These were Cases A(1), A(2) and A(3) in the classification of hypothetical cases already stated (*j*). Some other cases, which may be called Cases B(1) and B(3), should now be mentioned. In them the question of the foreign domicile was not complicated by the existence of any provision in the foreign law corresponding with article 13.

The case of *Ross v. Ross* (*k*) was decided by the Supreme Court of Canada, on appeal from the Court of Queen's Bench for Lower Canada (*l*). The testator, domiciled in Quebec, made in New York, during a temporary visit, a holograph will, which would have been valid if made in the province of Que-

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(*h*) See chapter 9, § 1. See also chapter 8, § 5.

(*i*) The evidence of the witnesses in the *Ross* case is analyzed, and the meaning of a reference by a foreign conflict rule to the national law of a British subject is discussed, in chapter 9, § 4. See also Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 239 ff.

(*j*) See § 6(1), *supra*.

(*k*) (1894), 25 Can. S.C.R. 307.

(*l*) (1893), Q.R. 2 Q.B. 413.

bec, by virtue of the rule *locus regit actum* prevailing in that province (*m*), but which was not valid by the domestic law of New York. The Court of Queen's Bench held unanimously (a) that the rule *locus regit actum* was imperative, not permissive, so that the question of the formal validity of the will was to be decided by the law of New York, and (b) that the will was valid as being made in accordance with a form recognized by the law of New York in the case of a testator domiciled in Quebec. On appeal to the Supreme Court of Canada, the will was held to be valid as to movables, (a) three judges against two being of opinion that the rule *locus regit actum* was permissive (*n*), not imperative, and (b) four judges against one being of opinion that the will was valid because it was recognized by New York law. The case is remarkable because the judgments of the majority were chiefly directed to the first point, and disposed of the second point quite casually, whereas the dissenting judge (Taschereau J.) delivered a vigorous and reasoned judgment on the second point (*o*). It must be admitted, however, that the case is favourable to the *renvoi* in the province of Quebec, at least as regards the formal validity of a will, and it is, of course, in accord with the prevailing *jurisprudence* of France. It is hardly necessary to point out that it is not an authority with regard to the law of the other provinces of Canada. Moreover, the decision is justified in the result, if the case is regarded, not as laying down a general rule with regard to the *renvoi* in all kinds of cases, but as an example of the special indulgence shown to wills in point of formalities (*p*).

Another case which is favourable to the *renvoi*, at least in the same limited sense, is *Frere v. Frere* (*q*). A person domiciled in Malta made in England a will in English form. By the law of Malta five witnesses were required for a will made

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(*m*) See § 2, *supra*, for a statement of the Quebec rule of conflict of laws, as to the formal validity of a will of movables

(*n*) In accordance with modern French law, as already pointed out in § 2, *supra*.

(*o*) Lafleur, *Conflict of Laws* (1898), p. 18, refers to it as "a very elaborate and powerful opinion." See also Schreiber (1918), 31 *Harv. L. Rev.* 523, at pp. 561-564, for a good discussion of the case.

(*p*) As in *Collier v. Rivaz* and *In re Lacroix*, as discussed in § 6 (2) (a) (d), *supra*. As to *Ross v. Ross* itself, see also chapter 8, § 6, and chapter 9, § 5.

(*q*) (1847), 5 *Notes of Cases* 593. See also chapter 9, § 5, note (*r*).

in Malta, but a will made outside of Malta by a person domiciled in Malta was valid if made in the form of the law of the place of making. The will was held to be valid in England.

The case of *Maltass v. Maltass* (r) contains a dictum favourable to the *renvoi* (s) but the decision did not involve the *renvoi*. The will was made in Turkey in English form, and was held to be valid alternatively by virtue of the Treaty of the Dardanelles (1809) or by domestic English law. As Dr. Lushington said (t): "If the deceased was, in the legal sense, domiciled in Turkey, and if the law of domicile does prevail, the law of Turkey, in conformity with the treaty, says, that in such case the succession to personal estate shall be governed by the British law; if he was not domiciled in Turkey, but in England, then the law of England prevails, *proprio vigore*."

## § 7. Status and the Law of the Domicile.

### (1) *Renvoi in German Law.*

In the series of relatively modern cases in which single judges in England have expounded a theory of total *renvoi* (a), it was necessary in discussing *In re Annesley* (b) to consider the French theory of the *renvoi* (c), and it was necessary in discussing *In re Ross* (d) to consider the Italian theory of the *renvoi* (e). It now becomes necessary, by way of introduction to the case of *In re Askew* (f), to consider the German theory of the *renvoi*.

It is provided (g) by article 27 of the Introductory Act of the German Civil Code (which became effective on January 1,

(r) (1844), 1 Robertson 67.

(s) *Ibid.*, at p. 72, quoted in *In re Ross*, [1930] 1 Ch. 377, at p. 392.

(t) 1 Robertson 67, at p. 80.

(a) As to the theory of "total *renvoi*", see chapter 9, §§ 1, 2. That theory requires that an English court shall take into consideration the specific theory of the *renvoi* prevailing in the foreign proper law.

(b) [1926] Ch. 692; see § 6(4) (d), *supra*.

(c) See § 6(4) (c), *supra*.

(d) [1930] 1 Ch. 377; see § 6(5) (b), *supra*.

(e) In § 6(5) (b), *supra*; cf. the more recent case of *In re O'Keefe*, [1940] Ch. 124, separately discussed in chapter 9.

(f) [1930] 2 Ch. 259.

(g) In my paraphrase of article 27 I have followed the explanation given by Westlake, *Private International Law*, chapter 2, that by

1900) that in any of the cases in which under articles 7(1), 13(1), 15(2), 17(1) and 25 there is a reference to the law (*Gesetze*) of a foreign state, if under the conflict rules (*Recht*) of the foreign law, German law is applicable, the domestic rules of German law shall be applied. The result is that German law adopts a theory of partial *renvoi* (*h*), at least in the cases mentioned in article 27.

Article 25, mentioned in article 27, provides that if a foreigner had his residence (*Wohnsitz*) in Germany at the time of his death, the succession to his property is governed by the law of the state of which he was a national at that time (*i*).

Article 22 provides that the legitimation of an illegitimate child is governed by German law if the father is of German nationality at the time of the legitimation, and also contains a special provision in the case of the child being a German national and the father being a foreigner. The article does not say that as a general rule the legitimation of a child whose father is a foreigner is governed by the national law of the father, but, either by implication from article 22, or in the absence of any provision of the code, the general rule of German conflict of laws appears to be as stated. The affidavit of Dr. Rost in *In re Askeu* (*j*), "accepted by all parties as being correct," so states the rule, with specific reference to legitimation by subsequent marriage. Article 22 is not mentioned in article 27, but it would appear that the principle of article 27 is applied to legitimation, either by analogy, or as an existing rule of German conflict of laws in the absence of any provision in the code, that is, that German law adopts a theory of partial *renvoi* (*k*), not only in the cases mentioned in article 27, but also in other cases, including legitimation (*l*).

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*Gesetze* the domestic or local rules of the law of a country are meant, and by *Recht* its whole system of law, including its conflict rules. To the same effect, see Wolff, *Internationales Privatrecht* (1933) 48. This nomenclature is of course different from that of Kahn, who uses *Gesetzenkollisionen* in the sense of conflicts of conflict rules: see chapter 3, § 1, note (*h*).

(*h*) As to the theory of "partial *renvoi*", see chapter 9, § 1.

(*i*) As to effect of article 27 in this situation, see the discussion of *In re Johnson*, [1903] 1 Ch. 821, in § 6(4) (*b*), *supra*.

(*j*) [1930] 2 Ch. 259, at p. 276. For further discussion of this affidavit, see chapter 9, § 2.

(*k*) The affidavit of Dr. Rost, above cited, does not mention article 27, but states that German law would accept the reference back from the national law.

(*l*) As to the extension of the principle of article 27, see also Lewald, *Règles générales des Conflits de Lois* (Bâle, 1941) 51, 52;

Much has been written in Germany on the subject of the *renvoi* (*m*).

(2) *Status in the Conflict of Laws.*

By way of further introduction to the subsequent discussion of the *Askeu* case may be mentioned the problem whether there are reasons for adopting a more favourable attitude to the doctrine of the *renvoi* as regards a question of status than the attitude adopted in the preceding part of this chapter as regards a question of succession to movables. In an earlier chapter (*n*) I have laid stress on the importance of distinguishing the question of the existence of a given status from a question of capacity or a question of the incidents or consequences of that status, and in a later chapter (*o*) I have given some reasons for submitting that as regards the question of the existence of a given status (other than the status of a married person, which is a question of marriage law) a court of a country other than that of the domicile should decide a case in the same way that a court of the domicile would decide it, and that the doctrine of the *renvoi* is to this extent and in this sense a useful device for achieving uniformity of decision. There is no necessity, however, for expressing the doctrine of the *renvoi* in terms of acquired rights, and, in order to avoid misunderstanding and at the risk of repetition, I venture to note here that I do not intend, in any approval of the *renvoi*

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*of. Raape, Deutsches Internationales Privatrecht, vol. 1 (1938) 43; Lorenzen, The Conflict of Laws of Germany (1930), 39 Yale L.J. 804, at pp. 812-814.*

(*m*) Among the works of German writers containing material of especial interest on the *renvoi* are Franz Kahn, *Abhandlungen zum Internationalen Privatrecht* (collected and republished, 1928); Frankenstein, *Internationales Privatrecht, vol. 1 (1926)*; Hans Lewald, *Droit International Privé de l'Allemagne* (in *Répertoire de Droit International, vol. VIII, pp. 293 ff., Paris, 1930*), published separately in German, *Das Deutsche Internationale Privatrecht* (Leipzig, 1931) 14 ff.; see also lectures by the same author, *La Théorie du Renvoi, in Recueil des Cours de l'Académie de Droit International, vol. 29 (1929, vol. 4) 519 ff.* As to the "*double renvoi*," see articles by Melchior (*Juristische Wochenschrift, 1931, pp. 703 ff.*), Walther Lewald (*Juristische Wochenschrift, 1931, pp. 114 ff.* and *Niemeyers Zeitschrift für Internationales Recht, vol. 44, 1931, pp. 1 ff.*), and Adolf Bing (*Blätter für Internationales Privatrecht, vol. 6, October 1931, pp. 246 ff.*), including a discussion of the *Askeu* case.

(*n*) See chapter 4, § 8.

(*o*) See chapter 8, § 6; for further discussion, see chapter 39.

as specifically applied to a question of the existence of status, to approve of the theory of acquired rights (*p*).

(3) *In re Askew*.

In the case of *In re Askew* (*a*) the question was whether Margarete Askew was legitimated by the subsequent marriage of her parents. Her father was a British subject and was domiciled in Germany both at the time of her birth and at the time of his marriage with her mother. Inasmuch as her father was domiciled at both times in a country the domestic law of which recognized legitimation by subsequent marriage, the case fell within the old English conflict rule in that it fulfilled the requirements of what has been conveniently called the *Wright-Grove* rule (*b*), whereas under the Legitimacy Act, 1926, the only material time is that of the subsequent marriage, and the domicile of the father at the time of the child's birth is immaterial. It seems to have been too hastily admitted in the *Askew* case (*c*) that a different result would have been reached under the Legitimacy Act, 1926, by reason of the provision of s. 1(2) that nothing in the statute should operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born. This exclusion of an adulterine child from the benefit of the statute is, however, part of a section which amends the domestic law of England by providing for legitimation by subsequent marriage if the father was domiciled in England at the time of the marriage and is not to be imported into s. 8 which amends the conflict rule of the law of England by eliminating any reference to the domicile of the father at the time of the child's birth (*d*). The problem which presented itself in the *Askew* case,

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(*p*) As to the theory of acquired rights, see chapter 2, *passim*, including the mention in chapter 2, § 1(4) of *In re Askew* as an example of a judicial statement of the theory. The *Askew* case will be discussed in detail in the next following part of the present chapter.

(*a*) *In re Askew*, *Marjoribanks v. Askew*, [1930] 2 Ch. 259.

(*b*) The expression is that of Scott L.J. in *In re Luck's Settlement Trusts*, *In re Luck's Will Trusts*, [1940] Ch. 864, at p. 884: see chapter 39, note (m). In that chapter it is submitted that the Court of Appeal in England erred in applying the *Wright-Grove* rule, by analogy, to the case of a child legitimated by his being acknowledged and adopted by his father under the law of his father's domicile.

(*c*) [1930] 2 Ch. 259, at p. 263.

(*d*) So held in *Collins v. Attorney-General* (1931), 145 L.T. 551, 47 Times L.R. 484, Bateson J.

apart from the Legitimacy Act, 1926, would be the same under that statute, namely, that by domestic German law Margarete was legitimated, but, because at the time of her birth her father had not yet been divorced from his first wife, she was not legitimated by domestic English law. The evidence as to German law given before Maugham J. (afterwards Lord Maugham) being that in the particular case a German court would apply domestic German law, Maugham J. applied domestic German law and held that Margarete was legitimated. There was, however, a patent defect, not noticed by the learned judge, in the evidence as to German law. The German conflict rule being that the question was governed by the father's national law, but that German law would accept a reference back from the national law (e), the witness seemed to think that there was a reference to English law and a reference back from that law to German law (f). If there had been, as there was not, satisfactory and intelligible evidence of the process of reasoning by which a reference by the German conflict rule to the national law led to English law and hence back to German law, the result, namely, the decision by the English court of a question of status in the same way that a court of the domicile would decide the question, would be justified (g). This does not mean, of course, that a similar doctrine would be applicable to a case of succession to movables, as in *In re Annesley* (h) and *In re Ross* (i).

In the *Annesley* case, as in the *Askeu* case, the result would have been the same if the English court had simply applied the domestic law of the domicile by the "direct route" suggested by Russell J. in the former case, and Maugham J. says in the latter case that "there is much to be said" for Russell J.'s "simple and rational solution." In view of the fact that in the *Ross* case the result was inconsistent with the "direct route," Maugham J. suggests that the position of British subjects should be made clear by "a very short statute." The suggestion is interesting, but in view of the mediocre success achieved by the legislature in its efforts to state and amend rules of the conflict of laws in Lord Kingsdown's Act (j) and in the Bills of Ex-

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(e) See part (1) of the present § 7, *supra*.

(f) This point is discussed in detail in chapter 9, §§ 2 and 4.

(g) See part (2) of the present § 7, *supra*. and the cross-references there given.

(h) [1926] Ch. 692: see § 6(4) (d) of the present chapter, *supra*.

(i) [1930] 1 Ch. 377: see § 6(5) (b) of the present chapter, *supra*.

change Act (*k*), the prospect of future statutory clarification of conflict rules is not bright.

Maugham J. brings John Doe back from across the Styx, endows him with his English domicile of origin and with British nationality, and then supposes that he migrates to the Commonwealth of Utopia, acquiring a domicile of choice there *animo et facto*. Then follows an explanation of the so-called *renvoi*, namely, that when an English rule of the conflict of laws refers a case to the *lex domicilii*, it does not in the particular case refer to the Utopian law *as such*, but refers to rights acquired under Utopian law by reason of John Doe's Utopian domicile (*l*). The result is a *renvoi* which is no *renvoi*, which involves no deadlock, and which reduces the *circulus inextricabilis* to "a (perhaps amusing) quibble;" and the explanation leads up to the statement that "an English court can never have anything to do with [the *renvoi*], except so far as foreign experts may expound the doctrine as being part of the *lex domicilii*." Maugham J. says however, that he approves of the substance of the decision in *In re Ross*, though he would be inclined to express some passages in the judgment in a somewhat different form, and does not wholly agree with Luxmoore J.'s explanation of all the cases.

The only new feature of Maugham J.'s explanation would seem to be that he expresses in terms of acquired rights (that is, in peculiarly indefensible terms) a theory of total *renvoi* (*m*) which in earlier cases was expressed in terms of deciding a case in the same way that it would be decided by a court of the domicile or in terms of a game of lawn tennis or ping-pong (*n*).

Maugham J. quotes with approval certain dicta of Scrutton L.J. in *Casdagli v. Casdagli* (*o*) which are favourable to the *renvoi* in cases of status, but it is submitted he is on disputable

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(j) See chapter 23.

(k) See chapter 14.

(l) The fallacious character of this distinction is discussed in chapter 2, § 2(2). If the distinction is not well founded it follows that Maugham J. was in error in using it for the purpose of explaining the doctrine of the *renvoi*.

(m) As to the theory of "total *renvoi*," see chapter 9, § 1.

(n) As to the various ways of expressing the theory of total *renvoi*, see chapter 8, § 5.

(o) [1918] P. 89, at pp. 110, 111. These dicta occur in a dissenting judgment in the Court of Appeal, the judgment of the majority being subsequently reversed by the House of Lords: [1919] A.C. 145.

ground when he says (*p*) that Lord Watson's dictum in *Abd-ul-Messih v. Farra* (*q*) that the acquisition of a domicile in a given country has the effect of making applicable the municipal law of the domicile, was overruled by *Casdagli v. Casdagli* (*r*). It is true that the latter case did decide, contrary to some of the dicta of Lord Watson in the earlier case, that if the *tactum* of residence in a foreign country and the *animus manendi* are proved, a domicile is established, without regard to the question what law then becomes applicable by reason of the change of domicile. The House of Lords, having decided that the *de cujus* was domiciled in Egypt, proceeded, quite in accordance with the particular dictum of Lord Watson now in question, to apply the municipal or domestic law of Egypt; and the law applied was none the less the municipal or domestic law of Egypt because, by virtue of certain capitulations, continued by the Government of Egypt after it had become a separate Sultanate, certain classes of residents of Egypt were entitled to say that in some respects their own national law should apply to them. Whatever privileges they might enjoy in this respect were secured to them by Egyptian law, and were part of the municipal or domestic law of Egypt (*s*). This law was the only law available to them as persons domiciled in a country having a composite system of personal law (*t*).

### § 8. Conclusions.

(1) As regards succession to movables generally, apart from a question of the formal validity of a will, it appears that with the exception of *In re Ross* (*a*), which, it is submitted, was wrongly decided, there exists no unequivocal authority in English law in favour of abandoning the rule of English conflict of laws stated by Lord Watson in *Abd-ul-Messih v. Farra* (*b*), with reference to the consequences attached to the acquisition

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(*p*) [1930] 2 Ch., at pp. 268-270.

(*q*) (1888), 13 App. Cas. 431, at p. 439. The passage in question is quoted in my conclusions, *infra*.

(*r*) [1919] A.C. 145, reversing [1918] P. 89.

(*s*) See especially, as to Lord Watson's dictum, the comments of Lord Atkinson in *Casdagli v. Casdagli*, [1919] A.C., at pp. 191-192; *cf.* Lord Dunedin at p. 175. As to *Abd-ul-Messih v. Farra*, see also a further quotation from Lord Watson's judgment in § 6(2) (*d*), in the present chapter, *supra*.

(*t*) See chapter 9, § 3, note (*x*).

(*a*) [1930] 1 Ch. 377: see § 6(5) (*b*), *supra*.

(*b*) (1888), 13 App. Cas. 431, at p. 439.

of a domicile in a given country, namely: "According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend (c).

(2) As to the formal validity of a will of movables, there appears to be no English case in which a will made in conformity with the domestic law of the domicile has been held to be invalid in point of form in England on the ground that it was not made in accordance with the rules of the conflict of laws of the domicile. It is highly improbable that there will ever be such a case, and, until it arises, it is premature to state any general rule that the law of the domicile means the rules of conflict of laws of the domicile, on the basis merely of cases in which wills were upheld as regards form on various, and sometimes alternative, grounds (d). On the other hand, though it is submitted that the cases relating to the formal validity of wills should not be cited in support of the *renvoi* as applied to the intrinsic validity of wills or to succession on intestacy, it is justifiable as regards formalities to uphold the validity of a will if it complies with either the domestic rules or the conflict rules of the law of the domicile (e) or of any of the laws specified in Lord Kingsdown's Act (f).

(3) As to cases relating to the formal validity of a will as well as cases relating to the intrinsic validity of a will or to succession on intestacy, there is a good deal of verbal recognition of the formula that a given case ought to be decided by an English court in the same way as the particular case would be decided by a court of the domicile, but (a) as regards formalities this formula has never been applied literally so as to render invalid a will complying with the domestic law of the domicile but not complying with the conflict rules of that law, and (b)

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(c) Cf. the dictum of Lord Watson in the same case quoted in § 6(2) (d), *supra*. See also the questions asked by Sir C. Cresswell in *In the Goods of Luigi Bianchi* (1862), 3 Sw. & Tr. 16, at p. 17: "What is the arrangement between the courts of Turin and Brazil? If the deceased was domiciled in Brazil at the time of his death, how can such an arrangement affect the grant to be made by me?" These passages are all quoted by Bate, Notes on the Doctrine of Renvoi (1904) 15, 18, 116.

(d) Cf. Bate, *op. cit.*, p. 109.

(e) See § 6(2) (a), *supra*, and chapter 9, § 5.

(f) See § 6(2) (d), *supra*, and chapter 9, § 5.

as regards the intrinsic validity of a will or succession on intestacy there is no decision of an appellate court applying the formula (*g*), and even the decisions of single judges, with the exception of the *Ross* case, have all reached the same result as if the court had applied the domestic law of the domicile.

(4) As regards succession to movables generally, including the intrinsic validity of a will, there is, it is submitted, no justification in either reason or authority for turning the formula into a general rule of the conflict of laws, as was done by Luxmoore J. in *In re Ross*, and, on the contrary, it is submitted, in accordance with the personal view expressed by Russell J. in *In re Annesley* (*h*), that when English law says that a case is governed by the law of the country of domicile of a given person, it means the law which that country would apply, not to the *propositus*, but to its own nationals domiciled there.

(5) It is of course outside the scope of the present chapter to discuss exceptional cases, other than those relating to succession to movables, in which the doctrine of the *renvoi* may be justifiable (*i*).

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(*g*) See chapter 8, § 6.

(*h*) [1926] ch. 692, at pp. 708-9, already quoted in § 6(4)(d), *supra*.

(*i*) See chapter 8, § 6, and chapter 9, § 5.

## CHAPTER VIII.

### RENOVI, CHARACTERIZATION AND ACQUIRED RIGHTS\*

- § 1. Introduction, p. 157.
- § 2. Conflicts of conflict rules, p. 159.
- § 3. Characterization of the question, p. 161.
- § 4. Application of the proper law, p. 163.
- § 5. Three modes of stating the *renvoi*, p. 166.
  - (1) The ping-pong theory, p. 167.
  - (2) The foreign court theory, p. 171.
  - (3) The acquired rights theory, p. 175.
- § 6. Exceptional situations, p. 176.
- § 7. *Renvoi* and characterization, p. 184.

#### § 1. Introduction.

There is no sign that the stream of writing on the doctrine of the *renvoi* is drying up. In England in 1938 Cheshire (*a*), in accord with Mendelssohn-Bartholdy (*b*), whose book had been published posthumously under Cheshire's editorship, joined the ranks of the opponents of the doctrine. In the United States there was until 1938 a practically unanimous consensus of opinion adverse to the doctrine as a principle of general application (*c*). This consensus of opinion was in-

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\*This chapter reproduces an article bearing the same title, published (1939), 17 Canadian Bar Review 369-398.

(*a*) Private International Law (2nd ed. 1938) 45 ff.; reviewed by Cook (1938), 33 Illinois L. Rev. 365, Griswold (1938), 51 Harv. L. Rev. 1127, Gutteridge (1939), 55 L.Q. Rev. 130, and Falconbridge (1938), 16 Can. Bar Rev. 501.

(*b*) *Renvoi* in Modern English Law (1937); reviewed by Cook (1937), 32 Illinois L. Rev. 504, Lorenzen (1938), 47 Yale L.J. 857, Griswold (1938), 51 Harv. L. Rev. 573, Haynes (1938), 54 L.Q. Rev. 137, Unger (1938), 1 Modern L. Rev. 332, Gutteridge (1938) 6 Camb. L.J. 473, and Falconbridge (1938), 16 Can. Bar Rev. 153.

(*c*) See the references given in chapter 7, § 1, note (d). See also Cook, Tort Liability and the Conflict of Laws (1935), 35 Columbia L. Rev. 202, at pp. 221 ff.; Cook, 'Contracts' and the Conflict of Laws (1936), 31 Illinois L. Rev. 143, at pp. 166-167. These articles are reprinted as chapters 13 and 14, together with a new chapter 9 on the *renvoi*, in Cook, Logical and Legal Bases of the Conflict of

errupted by Griswold in his article on Renvoi Revisited (*d*), followed by an article by Cowan (*e*), and a reply by Griswold (*f*). Part of the voluminous material published in continental Europe on the subject of the *renvoi* consists of a considerable number of articles specifically devoted to the *renvoi* in Anglo-American law, including, in 1938, an acute study by De Nova (*g*). In the circumstances I venture myself to "revisit" the *renvoi*, in order to make some tentative suggestions for reconsidering the *renvoi* problem in connection with problems of characterization and acquired rights, with the view of finding a solution somewhere between the two extremes of absolute rejection and absolute acceptance of the doctrine of the *renvoi*. After a review of various classes of conflicts of conflict rules (*h*) and some supplementary observations on characterization (*i*) an attempt will be made to analyze the various forms in which the doctrine of the *renvoi* has been stated, and to point out some of the difficulties encountered in its general application (*j*). On the other hand the doctrine may afford a useful, sometimes even an inevitable, device in some exceptional classes of cases (*k*), and perhaps if attention were concentrated on the special treatment of some classes of cases, there would be less need for anyone to put himself absolutely in the camp of the advocates, or in the camp of the opponents, of the *renvoi*. Many writers, whether they defend or condemn the doctrine, admit exceptions, and it would appear that the controversy has passed beyond the stage in which the doctrine can be either wholly rejected, or wholly accepted, on supposedly logical or other grounds.

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Laws (1942). The question of exceptional treatment of certain classes of cases is discussed in § 6, of the present chapter, *infra*, and in chapter 9, § 5.

(*d*) (1938), 51 Harv. L. Rev. 1165. Most of the material written in English pro and con is there cited.

(*e*) Renvoi Does Not Involve a Logical Fallacy (1938), 87 U. of Penn. L. Rev. 34. References are given to many books and articles published in continental Europe.

(*f*) In Reply to Mr. Cowan's Views on Renvoi (1939), 87 U. of Penn. L. Rev. 257.

(*g*) Considerazioni sul Rinvio in Diritto Inglese (1938), 30 Rivista di Diritto Internazionale 388.

(*h*) See § 2, *infra*.

(*i*) See §§ 3 and 4, *infra*.

(*j*) See § 5, *infra*.

(*k*) See § 6, *infra*.

## § 2. Conflicts of Conflict Rules (1)

The problem of the *renvoi* arises of course only in case of a conflict between the conflict rules of different countries, whether the conflict be patent or be latent, and some advance may be made towards general agreement if the different classes of conflicts are analyzed and distinguished, because the *renvoi* may afford a reasonable solution in one kind of conflict and may be inappropriate in another kind of conflict. In the course of analyzing different kinds of conflict of conflict rules one will inevitably encounter problems of characterization (qualification, classification), and problems of acquired rights, so that it may appear that problems of *renvoi*, characterization and acquired rights are all interrelated problems, and can be solved only by their being considered as such.

Conflict rules are usually expressed in terms of legal concepts combined with place elements, as, for example, when it is said in effect that as regards the transfer of the property in a thing *inter vivos* the dominant place element is the situs of the thing, as regards succession to movables the dominant place element is the domicile of the *de cujus*, and as regards the formal validity of a contract or of a marriage the dominant place element is the place of making (celebration). The dominant place element is thus the connecting factor, that is, the factor which connects the factual situation with a particular country, and leads to the selection of the law of that country as the proper law with regard to a particular question involved in the factual situation. The selection of the proper law must logically be preceded by the characterization of the question, and must be followed by the application of the proper law. Thus, in effect, in any case in which the factual situation includes any foreign place element or elements, the court's enquiry is divided into three stages. Firstly, the court must characterize, or define the juridical nature of, the question or each of the questions, raised by the facts. Secondly, the court must select a particular place element as being the important one with regard to the question or each of the questions as characterized, and, using that place element as a connecting factor, must select the law of a particular country (which may be law of the forum or may be the law of another country) as the law governing a particular question.

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(1) Cf. chapters 3 and 4.

Thirdly, in order to find a definitive answer to the question or each of the questions, the court must apply the law of the selected country to the factual situation. The application of the proper law to the factual situation raises the problem whether the proper law is to be applied to the actual situation, that is, the factual situation including its actual place elements, or is to be applied to a factual situation in which the place elements are hypothetically located in the country the law of which has been selected as the proper law. This is of course one of the matters which will come up for consideration in the subsequent discussion of the doctrine of the *renvoi*.

In each of the three stages of the court's enquiry there may be a conflict of conflict rules between the law of the forum and the law of a foreign country. In the first stage there may be a latent conflict arising from the fact that although the conflict rules of two countries are on their face the same in that they use the same connecting factor in the same sense, nevertheless they may be different in effect because the nominally identical question to which the rules relate is characterized in one way in one country and in another way in the other country, as, for example, if the conflict rules of both countries say that capacity to marry is governed by the *lex domicilii*, and that formalities of solemnization of marriage are governed by the *lex loci celebrationis*, but a requirement as to parental consent to the marriage of a minor is characterized in one country as a matter of capacity to marry (or some other aspect of intrinsic validity of marriage or essential feature of family law), and in the other country is characterized as a matter of formalities of solemnization of marriage. In the second stage there may be a latent conflict of conflict rules arising from the fact that the conflict rules of two countries are on their face the same, but are in reality different because the nominally identical connecting factor specified in the conflict rules is characterized or defined in different ways in the two countries, as, for example, if the conflict rules of both countries say that the *lex domicilii* is the governing law with regard to a given question, such as succession to movables, but domicile means one thing in one country and another thing in the other country. In the third stage there may be a patent conflict of conflict rules arising from the fact that the conflict rules of two countries are on their face different, as, for example, if the conflict rule of one country says that the *lex domicilii* governs a given question, such as

succession to movables, and the conflict rule of the other country says that the question is governed by the *lex patriae*.

### § 3. Characterization of the Question.

In conformity with a theory of characterization which is not infrequently advocated by writers of continental Europe (*m*), some Anglo-American writers have recently submitted that it is important to distinguish between (1) primary characterization of the question, preliminary to the selection of the proper law and therefore something which logically must be done in accordance with the concepts of the *lex fori* and without regard to any foreign law, no foreign law, *ex hypothesi*, having been yet selected as the proper law, and (2) secondary characterization occurring in the third stage of the court's enquiry (that of the application of the proper law), something which may logically be, and should be, done in accordance with the concepts of the *lex causae* (*n*).

There are of course problems arising in connection with the application of the proper law which may be described as characterization, delimitation or classification, including some phases of the *renvoi*, but one must not be too frightened by the argument that it is illogical, or putting the cart before the horse, to consider the provisions of a given foreign law which may be the proper law on some characterization of the question

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(*m*) *E.g.*, Fedozzi, *Il Diritto Internazionale Privato: Teorie Generale e Diritto Civile* (1935) 181 *ff.*, with special reference to Anzilotti; *cf.* Hakki, *Les Conflits de Qualifications dans les Droits Français, Anglo-Saxon et Italien Comparés* (1937) 95-97, with special reference to Cavaglieri and Anzilotti; *Bartin, Principes de Droit International Privé* (1930) vol. 1, pp. 231-235; Maury, *Règles Générales des Conflits de Lois, Recueil des Cours, Académie de Droit International*, vol. 57 (1936, III) 469, 508 *ff.*

(*n*) *Cf.* Unger, *The Place of Classification in Private International Law* (1937), 19 *Bell Yard* 3, at pp. 17, 19, 21; Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) 87; Cheshire, *Private International Law* (2nd ed. 1938) 30, 34, 37, reviewed by Unger (1939), 2 *Modern L.R.* 330; Hellendall, *The Res in Transitu and Similar Problems in the Conflict of Laws* (1939), 17 *Can. Bar Rev.* 7, at p. 107; Robertson, *A Survey of the Characterization Problem in the Conflict of Laws* (1939), 52 *Harv. L. Rev.* 747, at pp. 767 *ff.* The distinction between primary and secondary characterization does not appear to have been stressed by previous writers in English: Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920), 20 *Columbia L. Rev.* 247; Beckett, *The Question of Classification ("Qualification") in Private International Law* (1934), 15 *Brit. Y.B. Int. Law* 46.

before that law is selected as the proper law (o). It is sometimes a good thing to look before you leap, and especially in the conflict of laws it is sometimes desirable that the forum know something in advance about the definitive solution which will result from its selection of a particular law as the proper law. The content of the foreign law may even suggest analogies which lead to the formulation of a conflict rule of the forum in such terms as to bring about a reasonable economic or social result. Courts are all too likely to select the proper law in accordance with the concepts of the *lex fori* without regard to the consequences, and it would seem to be a pity to encourage them to do this by attempting to convince them that they cannot logically do anything else. This seems, however, to be what is meant when so much emphasis is placed upon the distinction between primary and secondary characterization. There would not seem to be any logical or other objection to the forum's considering the provisions of any potentially applicable law before definitely selecting the proper law. Exactly what is meant by the characterization of the question may be stated in somewhat more technical language. If characterization in this connection is defined as the determination of the juridical nature of something, the thing characterized must itself be juridical and not purely factual. We may perhaps speak of the subsumption of facts under rules of law, but we may not speak of the characterization of the facts or of a factual situation. A factual situation has no legal consequences without the actual application of rules of law to the facts, and cannot be thought of as having legal consequences without at least the hypothetical application of rules of law to the facts. If in the first stage of the court's enquiry the court must characterize the question as a preliminary to the selection of the connecting factor and consequently the selection of the proper law, the question to be characterized must be a legal question, that is, a question arising from the facts by reason of the hypothetical application of some rules of law. There is therefore no real distinction in principle between the characterization of the question and the characterization of rules of law (p). And since the main object of the enquiry in a situation containing foreign place elements is to determine whether the applicable rules of law are to be the local rules of the

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(o) Cf. chapters 4 and 6.

(p) See chapter 6, § 1.

*lex fori* or rules of law identical with, or similar or analogous to, the local law of a foreign country, it would seem to be desirable, to say the least, that the characterization of rules of law should so far as is practicable precede and not follow the selection of the proper law, in the first stage. If important matters of characterization are to be relegated to the third stage, as is suggested by some of those who insist upon the distinction between primary and secondary characterization, the process of characterization is deprived of elasticity and real efficacy, because *ex hypothesi* the proper law has been already finally selected without regard to the provisions of any foreign law, and it is too late for the court to revise its decision with regard to the selection of the proper law. It would seem to be desirable that the process of selection of the proper law should be rendered as flexible as possible, and it is essential for this purpose that the court should characterize the question in the light of all potentially applicable rules of law, and not, so to speak, in the dark; and any effort to create logical obstacles to freedom of choice on the part of the court in its search for a satisfactory solution is, it is submitted, to be deprecated.

By way of precaution it should be mentioned here that there may be such a thing as primary characterization (in a different sense from that already discussed), which turns on the distinction between substance and procedure. A court applies the procedural rules of the law of the forum and excludes the application of the procedural rules of the law of any other country. A reference by a conflict rule to the law of another country is therefore confined to the substantive law of that country, and if it appears that there is a rule of the law of the forum which, if applicable, is decisive in favour of the defendant, and the court holds it to be applicable because it is a procedural rule, the result is to prevent the court from applying the proper law of a foreign cause of action or to make it unnecessary for the court to enquire whether the proper law is a foreign law (*q*).

#### § 4. Application of the Proper Law (*r*)

As suggested above, undue emphasis on the distinction between primary and secondary characterization is to be de-

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(*q*) See chapter 12 (Substance and Procedure); cf. chapter 4, § 4 (Statute of Frauds) and chapter 13, § 1 (Limitation of Actions or Prescription).

precated because it tends to lead to the conclusion that the forum must in its so called primary characterization of the question have regard only to the concepts of the *lex fori* and because, by seeming to raise a logical objection to the consideration by the forum of the concepts of any potentially applicable foreign law prior to the selection of the proper law, it excludes from consideration elements which might assist the forum in reaching a desirable social or economic result. On the other hand the theory that so called secondary characterization or delimitation in the stage of the application of the proper law, is exclusively governed by the *lex causae*, would also appear to be open to criticism, as being too broadly or absolutely stated, because, if it means the complete abandonment of characterization to the *lex causae* or acceptance by the forum of the mode of characterization adopted by the *lex causae*, it may lead to the *renvoi*; and perhaps characterization or delimitation by the *lex causae* should be limited to those cases in which the question may be one which is governed by the law of a given foreign country and as regards which the forum is disposed to accept whatever a court of that country has decided or would decide. In other words it may be that characterization strictly in accordance with the *lex causae* is justified only in those exceptional classes of cases in which the forum is willing to apply the doctrine of the *renvoi* (s). Apart from these exceptional classes of cases, it is submitted that the forum, having characterized the question in the light of the potentially applicable laws, and having selected the proper law, should, in the stage of the application of the proper law, apply only such provisions of the proper law as, in the view of the forum, relate to the particular question with regard to which the forum has selected the particular law as the proper law.

The matter of the characterization or delimitation of the provisions of the proper law has been expressed in a pointed way by Wolff, who says that a conflict rule of the forum which runs "succession to movables is governed by the law of the domicile of the *de cuius* at the time of his death" means that all the rules of the *lex domicilii* which are characterized as part of the succession law of the domicile are to be applied (t).

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(r) Generally, as to the application of the proper law, see chapter 5.

(s) See § 6 of the present chapter, *infra*, and chapter 6, § 2.

(t) Internationales Privatrecht (1933) 37; (I have changed Wolff's example by substituting the *lex domicilii* for the *lex patriae*);

The same principle may be used if there are two or more questions arising from the factual situation, and if there is the consequent selection by the forum of two or more proper laws, so that on each question all the provisions of the selected proper law, and only such provisions, are to be applied as relate to the specific question, that is, the specific aspect of the case, with regard to which the proper law has been selected (*u*).

Closely connected with the matter just discussed is the problem of the "preliminary question" (*question préalable*, *Vorfrage*) which in recent years has been discussed as a separate question by some writers of continental Europe (*v*). Suppose that A claims to be entitled to succeed to property as the legitimated son of B, who has gone through the form of a marriage with C after C has given birth to A, and suppose that there is controversy as to (a) the validity of the marriage, (b) the legitimating effect of the marriage, and (c) the right of A to succeed. In a sense questions (a) and (b) are preliminary to question (c), but that is so only because in the particular case question (c) is the final question. It might happen that question (a) would arise in an entirely different connection, as, for example, with regard to the legitimacy of D, a child born to B and C after their marriage, or that question (b) would arise in connection with some question other than question (c), and it is submitted that all three questions should be consid-

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*of*. generalized statement by Maury, *Règles Générales des Conflits de Lois*, *Recueil des Cours*, Académie de Droit International, vol. 57 (1936, vol. III) 485. As appears by my own discussion in the present chapter, I do not mean, by adapting a phrase used by Wolff, to approve of it in the sense that the characterization of a rule of the proper law by that law is conclusive.

(*u*) See, *e.g.*, the famous case, so often discussed by continental writers, of the Netherlander who makes a holograph will in France notwithstanding that he is forbidden by the law of Holland to make a holograph will. The separate application of the proper laws governing capacity and formalities seems to give a satisfactory solution; see chapter 4, § 3. This solution is not, however, approved by Maury, *op. cit.* 487. The case is sometimes used by continental writers as an example of irreconcilable characterizations of the same question in different countries.

(*v*) Breslauer, *Private International Law of Succession* (1937) 18, gives credit to Anzilotti for having first discussed the question, and refers to the discussion in Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (1932) 245 ff., and Wengler, *Die Vorfrage im Kollisionsrecht* (1934) 8 *Zeitschrift für Ausländisches und Internationales Privatrecht* 148. Various views are discussed by Maury, *op. cit.*, 554 ff.; *cf.* Raape, *les Rapports entre Parents et Enfants*, *Recueil des Cours*, Académie de Droit International, vol. 50 (1934, iv) 485.

ered separately (*w*). If the alleged marriage is sought to be impeached on the ground of its formal or intrinsic invalidity, the matter should be decided by the proper law or laws selected by the forum, and even the legitimacy of A and his right to succeed may be governed by different laws. There would not seem to be any valid reason why the proper law governing A's right to succeed should also be the proper law governing any preliminary question. Various views have been advanced, however, in favour of the subordination to a greater or less extent of the decision of the preliminary question to that of the principal question.

It would appear, however, that there may be some exceptional cases in which a question may properly be regarded as being subsidiary to some other question, and governed by the law applicable to that question. For example, the characterization or classification of things as movable or immovable would appear to be subsidiary to the main question whether a proprietary right in immovables has been acquired in accordance with the *lex rei sitae*. Again, the characterization of an alleged right as being contractual or proprietary would appear to be a subsidiary question which must be answered in accordance with the *lex rei sitae*, not only as regards immovables, but also as regards movables, at least to the extent that proprietary rights in movables are governed by the *lex rei sitae* (*x*). There may also be other cases which may possibly be expressed in terms of a "preliminary question", but the utility of this mode of expression is not obvious and it is submitted that the enquiry whether one question is preliminary to another, or, conversely, whether the latter is subsidiary to the former, is only another way of saying that a court must characterize exactly the question upon which its adjudication is required, and must of course decide whether the question is an independent one governed by its own proper law or is merely incidental to or a sequel to some other question and therefore governed by the proper law of that question.

### § 5. Three Modes of Stating the Renvoi

The problem of the *renvoi*, that is, the question whether a reference to the law of a given country includes or does not

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(*w*) Cf. chapter 4, § 8.

(*x*) See § 6 of the present chapter, *infra*, and chapter 4, § 7.

include a reference to the conflict rules of that law, arises only if there is a conflict between the conflict rules of two countries. As has already been suggested (*a*), conflicts of conflict rules are divisible into three classes. A conflict of the first class is a latent conflict arising from a divergence in the characterization of the question involved in the factual situation, and the consequent selection of different connecting factors. A conflict of the second class is a latent conflict arising from a divergence in the characterization or definition of the nominally identical connecting factor indicated in the conflict rules of the two countries in relation to the same question. A conflict of the third class is a patent conflict arising from the fact that the conflict rules of the two countries indicate different connecting factors in relation to the same question. It is of course possible that a conflict of conflict rules of any one of these three classes may give rise to a *renvoi* problem. The problem is sometimes stated, however, as if it arose only from a conflict of the third class, although in fact in English cases the conflict giving rise to the problem has not infrequently been a conflict of the second class, and the difference between these two classes of conflicts has not always been sufficiently noted. On the other hand, there has been little or no disposition on the part of judges or authors even to speculate on the possibility of the *renvoi* in conflicts of the first class (*b*). One might attempt to discuss possible situations giving rise to *renvoi* problems in each of the three classes of conflict rules *seriatim*, but a better approach perhaps is to state the various ways in which the doctrine of the *renvoi* has been expressed and to discuss some of the implications and difficulties inherent in each form of statement.

(1) *The ping-pong theory.* One mode of stating the doctrine of the *renvoi* is that which is suggested by the word *renvoi*, namely, that the forum in X, in accordance with one of its own conflict rules refers to the law of Y as the proper law relating to a particular question, and the corresponding conflict rule of Y either (*a*) refers back to the law of X (*renvoi*, return reference, remission, *Rückverweisung*) or (*b*) refers forward to the law of a third country, Z (*renvoi*, forward reference, transmission, *Weiterverweisung*). If the original reference to the law of Y is regarded as a reference to the whole law of Y, including its

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(a) See § 2 of the present chapter, *supra*.

(b) See § 7, *infra*.

conflict rules (c), there is no logical reason why the reference by the law of Y (a) to the law of X or (b) to the law of Z should not be a reference to the whole law of X or Z, as the case may be, so that in (b) there may be a further reference forward from Z to a fourth country or back to X or Y, and in (a) there may be a reference back from X to Y. In (b) the practical difficulties in the way of the forum in X ascertaining how the case is to be decided are almost too terrifying to pursue, though the *circulus inextricabilis* is less likely to occur in (b) than in (a). In (a), however, the forum in X knows or is supposed to know its own law, including its conflict rules, and therefore merely has to decide whether it will "accept the renvoi" (d) from Y, and apply its own local law, abandoning its own original reference to the law of Y, or will send the case back again to Y, with the possibility that the reciprocal references will continue forever. The game or puzzle, including the alleged logical inevitability of its eternal duration, has been described in various more or less picturesque terms—international lawn tennis, legal battledore and shuttlecock, *circulus inextricabilis*, logical cabinet of mirrors, endless oscillation, circle or endless chain of references, merry-go-round. Whether a vicious circle is necessarily inherent in the doctrine of the *renvoi*, as is sometimes plausibly argued, is one thing, and whether logically or illogically the *renvoi* affords a satisfactory solution in some situations is another thing (e).

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(c) It has been suggested that logically one ought to speak of a reference to the conflict rules as contrasted with a reference to the local rules of law, and that one ought not to contrast the "whole law" with the local rules of law, because one includes the other, and that a reference to the "whole law" means a simultaneous reference to two different parts of the law—conflict rules and local rules—the application of which may lead to mutually inconsistent results. Cf. Abbott (1908), 24 L.Q. Rev. 133, 135-136; Schreiber (1918), 31 Harv. L. Rev. 523, 526. *Semble*, however, that there is no objection to contrasting the "whole law" with the local rules of law. A court applying the whole law must, expressly or impliedly, decide whether the local rules are applicable or not to the case, whereas a court applying the local rules only must exclude from consideration any question of choice of law. The alternatives are mutually exclusive. Cf. Griswold, *Renvoi Revisited* (1938), 51 Harv. L. Rev. 1165, at p. 1166, note 7.

(d) The expression has become stereotyped, but is not a happy one because it has to be distinguished from accepting the doctrine of the *renvoi*—something which the forum may do without necessarily accepting or acquiescing in the first reference back.

(e) See § 6 of the present chapter, *infra*.

A *renvoi* problem arises clearly in the third class of conflicts of conflict rules mentioned above, that is, the patent conflict resulting from the facts that the law of X says that a given question (as, for example, succession to movables) is governed by the *lex domicilii*, and that the law of Y says that the same question is governed by the *lex patriae*, and that the *de cujus* was a national of X domiciled in Y. Formerly English courts flirted with what is sometimes called the *désistement* theory, or the disclaimer of jurisdiction theory, namely, that if, on a reference by a conflict rule of the law of X to the law of Y as the *lex domicilii*, it is found that by the law of Y no effective domicile in Y is acquired, or that domicile is of no significance in the law of Y as regards the question upon which the conflict rule of the law of X refers to the law of Y, the result is that the law of Y disclaims jurisdiction over the question (*se désiste*), and the forum in X does not persist in attempting to apply a foreign law which disinterests itself, or disclaims its own applicability, and, in the absence of any effective or relevant domicile in Y, falls back upon the law of the former domicile, usually the domicile of origin, which might coincide with the domestic law of the forum (*f*). In later cases the English courts have disapproved of this doctrine, in accordance with older decisions (*g*) that domicile in an English conflict rule means domicile in the English sense without regard to the views of the law of the country of domicile concerning domicile or its effect, and have evolved the theory, that (a) if Y is willing to accept a second reference from X, the forum in X will apply the domestic law of Y (*h*) but (b) if Y is not willing to accept a second reference, the forum in X will apply the domestic law of X (*i*). The basis of alternative (a) is that the law of Y is receptive of the doctrine of the

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(f) See chapter 2, § 2(5), where Westlake's explanation of the *désistement* theory is stated. He advocated the application of the domestic rules of the law of the forum, but he did not find fault with the court's resort to the law of the domicile of origin in *In re Johnson*, [1903] 1 Ch. 821, as to which see chapter 7, § 6(4) (b), and chapter 9, § 4.

(g) *Bremer v. Freeman* (1857), 10 Moo. P.C. 306; *Casdagli v. Casdagli*, [1918] P. 89, 109, [1919] A.C. 145, 194.

(h) *In re Annesley*, [1926] Ch. 692 (France); *In re Askew*, [1930] 2 Ch. 259 (Germany). This is sometimes called the "double renvoi", and reaches the same result as if X applied the domestic law of Y on the first reference.

(i) *In re Ross*, [1930] 1 Ch. 377 (Italy). This solution seems to bear some resemblance to the *désistement* theory.

doctrine of the *renvoi* at least to the extent of construing its own conflict rule in such a way as to lead to the application of the domestic law of Y, whereas the basis of alternative (b) is that the law of Y is not receptive in this respect.

On analysis of the three cases in which the results just mentioned were reached, it would appear that each of the decisions has its own peculiar features. The *Ross* and *Askew* cases have this in common that the *renvoi* problem arose in each case from a patent conflict of conflict rules of the third class, whereas in the *Annesley* case the conflict was a latent conflict of the second class, and the decision was illogical in the sense that the court in X found the *de cujus* to be domiciled in Y in the teeth of the law of Y, and nevertheless applied provisions of the law of Y which by that law were applicable because the *de cujus* was domiciled in X, not Y (*j*). The modes of stating the doctrine of the *renvoi* were somewhat different in the three cases, the mode adopted in the *Annesley* case being a mixture of the first mode, now being discussed, and the *foreign court theory*, presently to be discussed, the mode adopted in the *Ross* case being the *foreign court theory*, and the mode adopted in the *Askew* case being the *acquired rights theory* (*k*).

The two opposing views with regard to the meaning of a reference by the conflict rule of X to the law of Y may be restated in another way, namely, (a) that the law to be applied in X is the law which in Y would be applicable to the factual situation, including its actual place elements, that is, in accordance with the conflict rules of Y, and (b) that the law to be applied in X is the law which in Y would be applicable to a factual situation similar to the actual situation except that all the place elements are hypothetically situated in Y, that is, the domestic law of Y (*l*).

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(*j*) For an analysis of the *Annesley* case, see chapter 7, § 6(4) (d).

(*k*) As to the *Ross* case, see chapter 7, § 6(5) (b). As to the acquired rights mode of stating the *renvoi*, see *infra* in the present § 5.

(*l*) Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 374, quotes the following version, prepared by him and approved by Beale, but not adopted by the American Law Institute, of § 7 of the Conflict of Laws Restatement; "Except as stated in § 8, whenever in this Restatement any matter is said to be determined or governed by the law of a given state, the term 'law' shall be construed to mean the purely 'local' or 'domestic' rule of that state, i.e., the rule applicable to a case similar in all other respects to the case in hand but presenting for a legal tribunal in that state no problem in the Conflict of Laws (or, containing from the point of view of a legal tribunal in that state no foreign element)."

(2) *The foreign court theory.* A second mode of stating the doctrine of the *renvoi*—the oldest occurring in English case law—is that which is contained in the judgment of Sir Herbert Jenner (afterwards Sir Herbert Jenner Fust) in *Collier v. Rivaz* (*m*), namely, that the forum in X, when it is referred by its own conflict rule to the law of Y, must decide the case as if it were a court sitting in Y. The same judge had indeed in an earlier judgment, in a case involving the formal validity of a will of movables (*n*), expressed the opinion that the court of the domicile had exclusive jurisdiction (*o*). Even the formula stated in *Collier v. Rivaz*, limited to law and excluding jurisdiction, is not simple in its general application. If the court in Y adopts the same formula, and decides the case as if it were sitting in X, we get into the *circulus inextricabilis*. In *Collier v. Rivaz* the conflict of conflict rules was of the second class, a latent conflict arising from the use of nominally the same connecting factor, *domicile*, in two senses, and the case

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(*m*) (1841), 2 Curt. 855; *cf.* chapter 7, § 6(2)(a); Schreiber (1918), 31 Harv. L. Rev. 539-541.

(*n*) *DeBonneval v. DeBonneval* (1838), 1 Curt. 857. Having found that the *de cuius* was domiciled in France, Jenner J. said: "The courts of that country are the competent authority to determine the validity of his will and the succession to his [movable] estate, and, as in the case of *Hare v. Nasmyth*, 2 Add. 25, the court suspends the proceedings here as to the validity of the will till it is pronounced valid or invalid by the tribunals of France." *Hare v. Nasmyth* was "a similar case, putting Scotland for France, before Sir John Nicholl in 1815" (Westlake). As to the *DeBonneval* case, see Schreiber (1918), 31 Harv. L. Rev. 537-539.

(*o*) A confusion between *lex* and *forum* which was condemned in *Orr v. Orr-Ewing* (1885), 10 App. Cas. 453, at pp. 502 ff., Lord Selborne. Before the beginning of the seventeenth century the idea had prevailed in England that causes governed by a given law were determinable by courts administering that law and not by any other courts, and apparently it was not till the second half of the eighteenth century (*Holman v. Johnson* (1775), 1 Cowp. 341, at p. 344) that it was unequivocally stated (by Lord Mansfield) that by "the law of England" a cause of action might in an English court be governed by the law of a foreign country (*cf.* *Robinson v. Bland* (1760), 2 Burr. 1077, 1 W. Bla. 234, 256). The same thing was said in effect by Sir William Scott (afterwards Lord Stowell) in *Dalrymple v. Dalrymple* (1811), 3 Hagg. 54. The old principle of exclusive administration of the court's own law still prevails in England in the matter of divorce. See Sack, *Conflicts of Laws in the History of the English Law*, in *Law: A Century of Progress* (1937), vol. 3, 342, at pp. 375, 395-398. From this point of view it is interesting to note Jenner J.'s shift from jurisdiction of the foreign court (1838) to application of foreign law by an English court (1841), and it is obvious that it was natural for him to express the application of foreign law in terms of the English court deciding as if it were sitting in the foreign country.

resembles *In re Annesley* in this respect. In other ways also the formula is not so simple as it might seem to be on first reading. In a case arising in X relating to the succession to the movables of a person who at the time of his death was domiciled (in the sense of the law of X) in Y, the formula may mean that the court distributes the movables situated in X:

(a) in the same way as a court in Y would distribute the same movables, that is, movables situated in X, belonging to the estate of the same person, that is, a *de cuius* who was domiciled (in the sense of the law of X) in Y, but who may have been domiciled (in the sense of the law of Y) in X or may have been a national of X, so that on one or other ground the law of Y may say that the succession is governed by the law of X; or

(b) in the same way as a court in Y would distribute, not the same movables, but movables actually or hypothetically situated in Y, belonging to the estate of the same person as explained in (a); or

(c) in the same way as a court in Y would distribute movables actually or hypothetically situated in Y and belonging to the estate, not of the actual *de cuius*, but of a *de cuius* hypothetically domiciled (in the sense of the law of Y) in Y or (if by the law of Y succession to movables is governed by the *lex patriae*) hypothetically a national of Y.

In (a) the situation in which the court of Y is supposed to serve as a guide to the court of X is the actual situation in which the court in X must give a decision, whereas in (b) the supposed decision of the court of Y relates to different movables, and in (c) not only are the movables different, but they belong to the estate of a different person. Logically it is only in (a) that a court in X can be thought of as being obliged to follow a judgment of a court in Y, or, in the absence of an actual judgment, to follow a hypothetical judgment; and probably Jenner J. had in mind something like construction (a), because he said that the English court "must consider itself sitting in Belgium under the particular circumstances of the case" (p).

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(p) *Collier v. Rivaz* (1841), 2 Curt. 855, at p. 859. As to Jenner J.'s probable meaning, see also notes (n) and (o), *supra*. The *Collier v. Rivaz* formula was applied in *In re Ross* [1930] 1 Ch. 377 (cf. note (k), *supra*), without consideration of the difficulties involved in an English court's deciding a case as if it were sitting in a foreign country. It is pointed out by Mendelssohn-Bartholdy,

It happens, however, under the Anglo-American theory and practice, that there is normally a separate administration in each country in which the *de cuius* has left assets, so that a judgment in Y with regard to movables situated in X must be a hypothetical judgment, not an actual judgment, and in order to confer jurisdiction upon a court in Y for the purpose of its hypothetical judgment, the actual situation must be varied by supposing at least that the movables are situated in Y (q), so that, in order to make the formula workable at all, construction (a) gives place to construction (b), by a mysterious process of conscious or unconscious transmogrification (r). If it is permissible to play fast and loose with the situation by the imaginary transfer of the situs of the movables from X to Y, thus making the conflict rule of Y applicable to movables actually situated in X, why not render the situation a wholly domestic one in Y by the imaginary transfer of the *de cuius* from X to Y so as to make applicable the local succession law of Y, under construction (c) of the formula? If the succession law of Y is purely territorial in the sense that it relates only to movables situated in Y and directs their distribution in accordance with the local succession law of Y, without regard to the domicile or nationality of the *de cuius*, and contains no rules whatever as to movables situated elsewhere, then on construction

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Renvoi in Modern English Law (1937) 34-35, that the formula should mean that the English court would decide the case in the light of every provision of the foreign law, substantive or procedural, which the foreign court would apply to the case, and the learned author asks, "Would the doctrine of *renvoi* survive that?"

(q) Incidentally it may be pointed out that on any view the judgment of a court of Y could not fairly be regarded as a judgment *in rem* and as such binding on a court in X, because on construction (a) of the formula the court in Y would not have within its control the movables situated in X, and on construction (b) or construction (c) a judgment of a court in Y would relate to movables which *ex hypothesi* are different from those which are to be distributed by the court in X.

(r) Cf. *In re Ross*, [1930] 1 Ch. 377, at p. 399: Dicey, Conflict of Laws (5th ed. 1932) 872; Dobrin, The English Doctrine of the *Renvoi* and the Soviet Law of Succession (1934), 15 Brit. Y.B. Int. Law 36. As Cook, Logical and Legal Bases of the Conflict of Laws (1942) 240, says: "Consequently it is not strictly accurate to say that the English court first refers the actual case before it to Italian 'law' for decision, and then 'accepts' the foreign court's reference of that case to English law. In other words, what the English court actually did in *In re Ross* was to decide that if the Italian courts would distribute movables subject to their control according to the English domestic rule, then it (the English court) would distribute the movables of the decedent subject to its control in the same way."

(a) of the formula a court in X could *ex hypothesi* get no information as to what a court in Y would decide beyond disclaiming jurisdiction, and the court in X would presumably apply the local law of X, but on either construction (b) or construction (c) of the formula the court in X would apply the local law of Y (s).

Attempts have sometimes been made to explain *Collier v. Rivaz* on the theory that Jenner J. meant to give effect, not to the conflict rules of the country of domicile, but to special local rules of the law of that country applicable to the making of wills there by foreigners (t). Whether Jenner J. had in mind any distinction of this kind is of course a highly speculative question, but in any event the result of the application of the formula stated by him would not appear to be limited in accordance with the distinction suggested. The result is that the forum gives effect to the law of the court of the domicile as to the disposition of a case containing from the point of view of the domiciliary court a foreign element. It is a matter of definition, but a rule of law which determines the effect of this foreign element would seem to be properly regarded as a rule of conflict of laws (u), and, in the light of later cases in which the *Collier v. Rivaz* formula has been understood in a broad sense, it has seemed better in the foregoing discussion of the difficulties inherent in the formula to assume that it involved the application of the conflict rules of the domicile. It should be mentioned, however, that there may be a class of cases (of which *Collier v. Rivaz* is not itself an apt illustration) in which the forum in X, upon being referred by its own conflict rule to the law of Y, must give effect to a reference back to the law of X or forward to the law of Z. If, for example, Y is a country in which there is no common territorial law applicable normally to local transactions between local people, but merely different sets of special rules applicable to different categories of persons on the basis of race, religion or nationality, and the

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(s) Dobrin, *op. cit.*, note (r), *supra*, points out that this would mean that as many refugees from Soviet Russia would, by reason of their intention to return to Russia in the event of a change of régime there, be held by an English court not to have lost their domicile of origin, they could not make a valid will except within the narrow limits of Soviet succession law, if at all.

(t) See especially Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) 59-66.

(u) Cf. Griswold, *Renvoi Revisited* (1938), 51 Harv. L. Rev. 1165, at p. 1198.

case which the forum in X has to decide depends upon the personal law of a person domiciled in Y, the forum has no choice but to apply the special rules of the law of Y applicable by the law of Y to that person, even though this involves the forum's giving effect to a reference by the law of Y to the law of X or Z (*v*).

(3) *The acquired rights theory.* A third mode of stating the doctrine of the *renvoi* is an attempt to evade the difficulties inherent in the first mode of stating the doctrine (the *ping-pong theory*) and in the second mode (the *foreign court theory*) respectively, by the theory that the forum in X is referred by its conflict rule to the law of Y merely for the purpose of ascertaining whether rights have been acquired under the law of Y which ought to be recognized in X, so that the forum is concerned with the doctrine of the *renvoi* only to the extent that the doctrine is recognized by the law of Y (*a*). Thus the arbitrary stopping of the game either on the return of the service (*b*) or after the server has been allowed a second stroke (*c*) depends solely upon the whim of the player in whose court the ball has been placed by the server. The result is therefore the same as under the first mode of statement, but the result is rendered more plausible by the omission of all mention of possible reciprocal references; and if the law of Y adopts the same theory, that is, that the reference by the conflict rule of Y to the law of X is solely to ascertain whether rights have been acquired under the law of X, we are back in the *circulus inextricabilis*. Furthermore, the third mode of stating the doctrine would seem, on analysis, to be lacking in reality. If rights are acquired in Y which ought to be recognized in X, it must be because the law of X says that the law of Y has jurisdiction to create the rights in question, and the rights in question must be rights arising from the application of the law of Y to the actual factual situation which presents itself to the court in X, as, for example, is contemplated by construction (*a*) of the *foreign court theory* formula—the second mode of

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(*v*) As to cases of "extraterritorial jurisdiction" or a reference to the law of a country having a composite system of personal law, as in *Bartlett v. Bartlett*, [1925] A.C. 377, see chapter 9, § 3, note (*x*).

(*a*) *In re Askew*, [1930] 2 Ch. 259; note (*h*), *supra*. For an analysis of the *Askew* case, see chapter 7, § 7(3). As to the acquired rights theory, see also chapter 2, § 1.

(*b*) *In re Ross*, [1930] 1 Ch. 377; notes (*i*) and (*k*), *supra*.

(*c*) *In re Annesley*, [1926] Ch. 692; notes (*h*) and (*j*), *supra*.

stating the doctrine of the *renvoi* already mentioned. Just as the theory that the court in X decides as if it were sitting in Y is deprived of the quality of reality when a hypothetical situation is substituted for the actual situation, so the acquisition of rights by the law of Y ceases to be a reality if the court in X instead of asking what rights have been acquired by the law of Y in the actual situation, asks what rights would have been acquired by the law of Y in some other situation, as, for example, when the movables are hypothetically transferred to Y so as to confer jurisdiction upon a court in Y, or to confer upon the law of Y jurisdiction to create rights, in respect of the movables. The acquisition of rights under the law of Y is a pure fiction invented by the court in X either (a) when the law of Y is inapplicable to the actual situation and therefore does not create any rights or (b) when the court in X supposes that the actual situation is a different situation in order to make it one to which the law of Y is applicable. In either event the rights are created by the law of Y only in the sense that the law of X says that they are so created (d).

### § 6. Exceptional Situations (e)

It has been suggested that theories in the conflict of laws go round and round, and that their chief merit is that they are good mental gymnastics, sharpening the wits of lawyers and students (f), and this suggestion may seem especially appropriate to theories concerning the *renvoi*. In any event it should be noted that the English case law which affords the basis for speculation on the doctrine of the *renvoi* consists, with one obscure exception (g), of decisions of single judges, differing

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(d) As to the general principle that the forum applies only its own law and enforces only rights created by its own law, see chapter 2, § 2(2).

(e) Cf. chapter 9, § 5.

(f) Cf. de Sloovere, Book Review (1938), 15 N.Y. Univ. L.Q.R. 601.

(g) *Bremer v. Freeman* (1857) 10 Moo. P.C. 306; cf. chapter 7, § 6(2)(a). The reasoning of the judgment is so obscure that the case has been cited sometimes for the *renvoi*, sometimes against the *renvoi*. Luxmoore J., in *In re Ross*, [1930] 1 Ch. 377, at pp. 393-394, gives a summary of the reasoning, and considers that the case supports the theory of *Collier v. Rivaz*. Maugham J., in *In re Askew*, [1930] 2 Ch. 259, does not even mention *Bremer v. Freeman* as an authority for or against the *renvoi*. Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) 69, says that the judgment in *Bremer v. Freeman* "effectually disposes of *Collier v. Rivaz*". If the judgment in *Bremer v. Freeman* had been unequivocal, it would, as a

*inter se* in their reasoning, and not binding on other judges (*h*), although some writers of continental Europe seem more inclined than Anglo-American writers to regard the problem of the *renvoi* in Anglo-American law as being settled by authority.

Again, the English decisions upon the *renvoi* relate only to the meaning of "the law of the domicile" in an English conflict rule (*i*), and afford no support for a general principle that a reference by an English conflict to the law of a foreign country means the whole of that law, in cases in which domicile is not the connecting factor (*j*), and in fact in many cases English courts have as a matter of course applied the domestic rules of the proper law indicated by English conflict rules, apparently without considering the possibility of the *renvoi* (*k*).

Moreover, most if not all of the older cases upon the *renvoi* belong to a still more limited field, namely, the law of the domicile in its relation to the formalities of making of a will. These cases constitute perhaps a separate class in which the *renvoi* is a justifiable alternative device for upholding a will which admittedly embodies the expression of a testator's latest testamentary intention, and which is admittedly a valid will in every point except in point of formalities. As regards the formal validity of an otherwise valid will there is much to be said for the view that the will should be upheld if it complies with either the domestic rules or the conflict rules of the proper law selected in accordance with the conflict rules of the forum,

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judgment of the Privy Council on appeal from an English court, have had considerable weight as an authority on the *renvoi* in English law. On the other hand, the Privy Council, if it hears an appeal from another "country" (province, state, colony, etc.), must of course decide the case as if it were sitting in that country, and apply the conflict rules of that country, and if such conflict rules contain a reference to the law of England or the law of some other country, the application of the law indicated by that reference is not an example of the *renvoi*: cf. chapter 10. As to cases on extra-territorial jurisdiction, see chapter 9, § 3. The case of *Ross v. Ross* (1894), 25 Can. S.C.R. 307, decided by the Supreme Court of Canada, will be especially mentioned later.

(*h*) Goodhart, *Precedent in English and Continental Law* (1934), 50 L.Q. Rev. 40, at p. 42: "Nor is one court of first instance bound by the decision of another court of similar jurisdiction, although it will pay it great respect."

(*i*) One exception is *In the Goods of Lacroix* (1877), 2 P.D. 94, in which the conflict rules of the place of making of a will were applied; cf. note (*l*), *infra*.

(*j*) Cf. Mendelssohn-Bartholdy, *Renvoi in Modern English Law* (1937) 17.

(*k*) Mendelssohn-Bartholdy, *op. cit.* 44-57.

that is, as to immovables the *lex rei sitae*, as to movables the *lex domicilii*, or, as to personal property, the *lex loci celebrationis* or any of the other alternatives allowed by Lord Kingsdown's Act (1). When English courts in various cases applied the conflict rules of the domicile for the purpose of upholding wills in point of form, they did not decide, and it is almost certain that no English court will ever decide, that a will made in accordance with the local forms, but not in accordance with the conflict rules, of the domicile would be formally invalid. The courts will almost certainly continue to uphold wills in point of form by the alternative application of the domestic rule and the conflict rule of the selected proper law, and until the courts have decided that one of the two rules is exclusively applicable, the cases relating to the formal validity of wills have really no bearing on the general question whether the reference in a conflict rule of the forum to a foreign law means the whole law or the domestic law (m). Nevertheless, although cases of this kind ought not to be used in support of the general doctrine of the *renvoi*, it was through such cases that the doctrine obtained a foothold in English law.

The case of *Ross v. Ross* (n), decided by the Supreme Court of Canada, should be especially mentioned here. A holograph will made in New York by a testator domiciled in Quebec was held to be valid in Quebec under article 7 of the Civil Code of Lower Canada, which provides in effect that a will is valid if it is made according to the forms required by the law of the place of making. In the Supreme Court (a) three of the five judges held article 7 to be permissive, not imperative, and (b) four of the five judges held that a will made in a form recognized as valid by New York law although not made in a local New York form was valid even if article 7 were imperative. Some observations might be made on the case as an authority on either of the alternative grounds of decision or on the *renvoi* generally, but the result, limited to a question of the formal validity of a will, is in accordance with the trend of

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(1) Cf. *In re Lacroix*, note (i), *supra*. For further discussion of this case, see chapter 9, § 5.

(m) As to the subject of the whole of the paragraph in the text, see chapter 9, § 5, and chapter 7, § 6(2).

(n) (1894), 25 Can. S.C.R. 307; cf. chapter 7, § 6(6). For a good discussion of the case, see Schreiber, *The Doctrine of the Renvoi in Anglo-American Law* (1918), 31 Harv. L. Rev. 523, at pp. 561-564.

English decisions and with the view advanced above in favour of treating cases relating to the formalities of making of wills as a special class.

In England, as already pointed out, the courts have been inclined, in cases not involving the *lex domicilii* as such, to assume that a reference to a foreign law means a reference to the domestic rules of that law, and in the United States the disregarding of the possibility of the *renvoi* has been even more general. On that account the case of *University of Chicago v. Dater* (o) appears to be a veritable *enfant terrible*. One of the defendants, a married woman, signed, in Michigan, a promissory note and a mortgage on land situated in Illinois to secure repayment of a loan to be made by the plaintiff to the woman's husband and others. The documents were posted in Michigan by the plaintiff's agent to the plaintiff in Illinois, and, after the removal of a cloud on the title to the land, the loan was completed by the payment of the money in Illinois. In an action brought in Michigan upon the note it was held that the married woman was not liable, she having no capacity by the law of Michigan to bind her separate estate by a personal engagement for the benefit of other persons, although by the law of Illinois a married woman has complete capacity to contract. According to the opinion of the majority of the appellate court, if the place of contracting was Michigan the married woman was clearly not liable, and if the place of contracting was Illinois the result was the same because by the conflict rules of Illinois the married woman's capacity would be governed by the law of Michigan as the law of the place of contracting. Three of the seven judges dissented, on the ground that by the *lex fori* the contract was made in Illinois, and that the Michigan court should disregard the Illinois law as to the place of making and should apply the local law of Illinois as to capacity to contract. The case is notable because the majority of the court applied the doctrine of the *renvoi* in the field of commercial contract law, a field which has been hitherto relatively free from the doctrine, and because the conflict of conflict rules was of a class in which, it is submitted, the *renvoi* is peculiarly open to objection, that is, a conflict as to the charac-

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(o) (1936), 277 Mich. 658, 270, N.W. 175; Lorenzen, Cases on the Conflict of Laws (5th ed. 1945) 302; Harper and Taintor, Cases on Judicial Technique in the Conflict of Laws (1937) 248; comments in (1937), 50 Harv. L. Rev. 1119, 1159; 35 Mich. L. Rev. 1299; 21 Minn. L. Rev. 739.

terization or definition of the connecting factor, a matter usually considered as being one which should be decided in accordance with the concepts of the forum. The decision is of course inconsistent with § 7 of the Conflict of Laws Restatement (rejecting the *renvoi* and providing for characterization by the *lex fori*), but on the other hand it is in accord with the acquired rights theory. The Michigan court did recognize an immunity created by the law of Illinois; whereas if it had applied Illinois local law it would have recognized "hypothetical relations of hypothetical parties" (p).

The result of the *Dater* case is approved by Griswold (q) and he cites the case in support of the doctrine of the *renvoi*, whereas Cook (r) suggests that Griswold approves of the *renvoi* technique adopted by the court because he approves of the result. According to Cook the result might be justified without regard to the *renvoi*, because the case involved characterization as well as *renvoi*. As all the acts of the married woman were done in the state of her domicile, "and the other party knew that if he ever sued her he would probably have to sue there, grounds of social policy seem clearly to require that her capacity to contract should be held to be governed by the law" of her domicile.

An exception is generally made in favour of the *renvoi*, even by those who do not approve of the general application of the doctrine, in the case of title to land. It would appear that as regards interests in immovables it is logical, and indeed inevitable, that a court sitting in a country other than that of the situs should acquiesce in whatever the *forum rei sitae* has decided or would decide, including, as a subsidiary question, or as a necessary incident in the process of the characterization of the question, the characterization or classification of things and of interests in things (s). Also, as regards interests in movables, there is much to be said on principle in favour of the same view, that is, that overriding effect should be given to the *lex rei sitae*, although, owing to the mobility of the subject matter, the practical necessity of giving effect to an

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(p) Stumberg, *Conflict of Laws* (1937) 203 (with reference to some earlier cases).

(q) *Renvoi Revisited* (1938), 51 *Harv. L. Rev.* 1165, at p. 1207.

(r) *Logical and Legal Bases of the Conflict of Laws* (1942) 246-248, 439-440.

(s) Cf. chapter 4, § 7. As to the "preliminary question," see § 4 of the present chapter, *supra*.

interest created by the *lex rei sitae* may subsequently cease to exist. As to both immovables and movables, if effect is to be given to an interest acquired under the *lex rei sitae*, it follows that the subsidiary question must itself be answered in accordance with the *lex rei sitae*. To this it has been objected that it is illogical to characterize a question in accordance with the *lex rei sitae* when the applicability of the *lex rei sitae* depends on the particular way in which the question is characterized, and that the question must be decided by the *lex fori*, though the principle of effectiveness requires that the *lex rei sitae* be consulted as a part of the factual situation (*t*). If the view is accepted, however, that the *lex rei sitae* is the governing law with regard to proprietary rights, it is submitted that full effect can be given to this rule only if it is by that law that it is decided whether a right is proprietary or not. Therefore, if a person claims to have acquired, by transfer *inter vivos*, a proprietary right in a thing, not only must the *lex rei sitae* be consulted because it may be the proper law, but also that law is decisive of the question whether the right, if any, is proprietary or not (*u*).

As regards the application of the doctrine of the *renvoi* to cases other than title to land, there is great diversity of opinion. The Conflict of Laws Restatement, in the various drafts of § 8, shifted from a "question of status" (1926) to the "existence of marital status" (1930), and finally to "questions concerning the validity of a decree of divorce" (1934). In its final form the Restatement would appear to be right, so far as it goes. Some measure of uniformity with regard to divorce decrees is secured by the acceptance of the view that a decree is valid if it either was pronounced by a court of the domicile or is a decree which would be recognized as valid by a court of the domicile (*v*); and the acceptance of this view will partially bridge the gap between countries in which divorce jurisdiction is based on domicile and countries in which divorce jurisdiction is based on nationality. The matter is one of jurisdiction, however, and not one of choice of law, and if there is anything which may properly be called the *renvoi*, it is *renvoi* in a somewhat different sense from the *renvoi* which is discussed in the present chapter. It is a theory of jurisdiction of courts which helps to make uniform

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(*t*) Hellendall, *The Res in Transitu and Similar Problems in the Conflict of Laws* (1939), 17 Can. Bar Rev. 7, at pp. 107-109.

(*u*) See chapter 4, § 7, and cross references there given.

(*v*) See chapter 40, § 6(b).

the recognition of marital status so far as that status is dependent solely upon the validity of the dissolution of a given marriage.

Again, if the existence of marital status is dependent solely upon the validity of a given marriage, as distinguished from the validity of the dissolution of a given marriage, there is no question of status that can be referred to a single law governing status, and the question is really one of marriage law, which may be referable to one or more of several laws according as the marriage is sought to be impeached as being invalid in point of formalities of celebration or as being intrinsically invalid by reason of incapacity of parties or otherwise. In a sense the question of the validity of the marriage is a preliminary question (*w*) to the question of the existence of the status, but there would seem to be no reason why on that account the selection of the proper law with regard to any aspect of the validity of the marriage should be subordinated to the selection of the proper law with regard to status; on the contrary the question of status is in the circumstances a mere incident or result of the decision on the main question of the validity of the marriage. As to the validity of a given marriage, there is much to be said for the view that if the only point in issue is its formal validity, it should be sufficient that either the local formalities of the *lex loci celebrationis* or any formalities recognized as valid in the particular case by that law have been complied with (*x*).

As regards the existence of status other than marital status, and distinguished from capacity and from consequences of status (*a*), it would seem to be desirable, in order to secure uniformity, that whatever has been decided or would be decided by a court of the domicile (whether by the use of its conflict rule referring to the *lex domicilii* or the *lex patriae*, as the case may be, or by the application of its own local law) should be followed by a court elsewhere (*b*). A status may be regarded as a *res*, at

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(*w*) As to the "preliminary question", see § 4, *supra*.

(*x*) See *In re Lando's Estate*, *Lando v. Lando* (1910), 112 Minn. 257, 127 N.W. 1125, Lorenzen, *Cases on the Conflict of Laws* (4th ed. 1937) 750, Harper and Taintor, *Cases on Judicial Technique in the Conflict of Laws* (1937) 300; *cf.* the analogous treatment of the formalities of making of an otherwise valid will already suggested.

(*a*) See chapter 4, § 8, and chapter 39.

(*b*) See chapter 7, § 7(2)(3).

least in a metaphysical sense (*c*). In the case of succession the movables situated in one country are one *res* and those situated in another country are another *res*, so that a judgment of a court of the country of the domicile with regard to the movables situated there and under the control of the court there cannot be regarded as a judgment *in rem* with regard to the movables situated elsewhere; and there are difficulties both practical and theoretical in the way of a court's deciding a question of succession to movables in the same way as the same question would be decided by a court of the domicile (*d*). The status of a person is, however, a single *res*, and a judgment or a hypothetical judgment of a court of the domicile may be regarded as a judgment *in rem*, and there would seem to be substantial reasons of social policy in favour of the view that a person's status under the law of the domicile should be recognized elsewhere. The recognition of such status, limited to the existence of the status, would usually be relatively free from difficulty, and would still leave open questions as to the incidents or consequences of that status or the capacity of a person having that status, some at least of which questions may not be questions of status and may under the conflict rules of the law of the forum be governed by some law other than the law of the domicile.

Again, if all the factual elements of a situation have taken place or are localized in a foreign country, so that in a court of that country the situation would be a purely domestic situation presenting no problem in the conflict of laws, and litigation takes place in another country with which the situation is wholly unconnected except by reason of the fact that that country is the place of litigation, a relatively strong case is presented in favour of the view that the court should decide the issue as if it were a court sitting in the foreign country (*e*). No question of the *renvoi* is involved in this case, however.

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(*c*) Cf. *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, at pp. 655, 662. As to this case, see chapter 40, § 8.

(*d*) See note (*r*) in § 5 of the present chapter, *supra*.

(*e*) Cf. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 21. While the reference is apt with regard to the general principle, it is of course not appropriate to the particular case of tort liability (which Cook is there discussing) so far as English conflict of laws is concerned. See chapter 45. As to Cook's proposition, see chapter 2, § 2(2), note (*n*).

because *ex hypothesi* the foreign court would apply its own domestic law.

It may be objected that the result of the foregoing discussion is that the general rule that the doctrine of the *renvoi* should be rejected is eaten up by the exceptions, and that it would be better to accept the doctrine except in cases in which it leads to the *circulus inextricabilis* (*f*). It is submitted, however, that the exceptions relate to a relatively small part of the whole field of law, and that practical, if not theoretical, considerations lead to the conclusion that, as a general rule, a court should not have to concern itself with the conflict rules of the proper law selected by it according to its own conflict rules. The burden, sometimes heavy, sometimes almost insuperable, of ascertaining and applying foreign conflict rules should not, as a purely practical matter, be imposed on a court unless it appears, or is made to appear by one of the litigants, that the situation is an exceptional one in which consideration of the conflict rules of the proper law is required or justified on practical or theoretical grounds or on the basis of policy in order to reach a just result. While it cannot be expected that there will be unanimous agreement as to all the exceptional cases, it does not seem to be unlikely that substantial agreement can be reached (*g*).

### § 7. Renvoi and Characterization.

A *renvoi* problem may of course arise from any conflict between the conflict rules of the forum and the conflict rules of a foreign country (*h*). It has appeared from the foregoing review of some aspects of the doctrine of the *renvoi* that the doctrine has been much discussed in connection with the second and third classes of conflicts of conflict rules, and that in that connection courts have shown some inclination to defer to the conflict rules of foreign countries. In the third class of conflicts courts have sometimes given effect to a foreign conflict rule which is patently different from the conflict rule of the forum

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(*f*) Cf. Griswold, *Renvoi Revisited* (1938), 51 Harv. L. Rev. 1165, at p. 1183.

(*g*) For various suggestions as to exceptional cases, see Lorenzen (1918), 27 Yale L.J. 529, 531, and (1921), 31 Yale L.J. 191, 193; (1922), 35 Harv. L. Rev. 454, 455; (1926), 36 Yale L.J. 114; Griswold (1938), 51 Harv. L. Rev. 1165, 1171, 1176; Cowan (1938), 87 U. of Penn. L. Rev. 1, 7-8.

(*h*) See § 3 of the present chapter, *supra*.

in that different connecting factors are specified in the two rules, and in the second class of conflicts they have sometimes given effect to a foreign conflict rule which is different from that of the forum only because the nominally identical connecting factor bears different meanings in the two countries. Strange to say, courts have not shown a similar disposition to defer to the conflict rules of a foreign country in the first class of conflicts of conflict rules, that is, where the conflict rules of two countries are the same in terms, using the same connecting factor in the same sense, and the conflict arises solely from a difference in the characterization of the question involved in the factual situation. It might have occurred to the courts in this first class of conflicts, as in the second and the third classes, that they should apply the doctrine of the *renvoi*, but on the contrary they have been inclined to go to the other extreme in characterizing the question in accordance with the concepts of the *lex fori*, apparently either without realizing that there is a conflict of conflict rules at all or without considering that it may be desirable to approach the problem of characterization in such a way as to avoid or alleviate the conflict. At the risk of repetition I venture to suggest that the process of characterization should be a flexible one, involving the consideration of the provisions of potentially applicable laws and the consequences of the selection of the proper law (*i*). It is at least clear that the interrelation of characterization, the *renvoi* and acquired rights has not yet been fully explored, and it is submitted that the matter deserves further consideration.

One of the most recent writers on the *renvoi* has indeed laid stress on the possibility of the *renvoi* problem arising in connection with the conflicts of characterization (*j*). but it would appear that he has chiefly in mind conflicts relating to the characterization or definition of the connecting factor, such as domicile or place of contracting. In fact in English law the *renvoi* problem originally arose in connection with this class of conflict of conflict rules, with particular reference to the concept of "domicile" (*k*). My present point is, however, somewhat

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(i) See § 2 of the present chapter, *supra*.

(j) Cowan, *Renvoi Does Not Involve a Logical Fallacy* (1938), 87 U. of Penn. L. Rev. 1, note 3.

(k) See § 5 of the present chapter, *supra*. In *University of Chicago v. Dater* (1936), 277 Mich. 659, 270 N.W. 175, note (o), *supra*, the *renvoi* was applied in a conflict of conflict rules of the same class, with particular reference to the concept of "place of contracting."

different, namely, the applicability of the doctrine of the *renvoi* to the case of a conflict in the characterization of the question in two countries, leading to the selection of different connecting factors, as, for example, if by the law of X a requirement as to parental consent to the marriage of a minor is characterized as part of the formalities of solemnization of marriage, so that the *lex loci celebrationis* is the governing law, and by the law of Y such a requirement is characterized as a matter of capacity to marry or intrinsic validity of marriage, so that the *lex domicilii* is the governing law. My object is limited for the moment to pointing out that, so far as there is any logic in the present subject, the application of the doctrine of the *renvoi* might be just as logical or illogical in this class of conflict of conflict rules as in any other class. Conflicts of this class may be less obvious or more subtle than the conflicts in which the doctrine has heretofore played a part, but as the courts become more conscious of the existence of latent conflicts arising from divergent modes of characterization, then, if they are disposed to decide a case as it would be decided by a court of a given foreign country, there is no particular reason why they should not extend the doctrine of the *renvoi* to these conflicts. Personally I am not in favour of their doing so, as I think that the doctrine should be rejected apart from exceptional classes of cases already discussed, and I submit that without abandoning characterization of the question absolutely to the *lex causae*, a just result may be reached if the question is characterized by the forum in the light of the potentially applicable laws. Sometimes the same result will be reached as if the doctrine of the *renvoi* were applied, but something will be left to the discretion of the forum <sup>(1)</sup>.

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(1) See §§ 3 and 4 of the present chapter, *supra*.

## CHAPTER 9.

### RENOI AND THE LAW OF THE DOMICILE\*

- § 1. Rejection of *renvoi*, theory of partial *renvoi* and theory of total *renvoi*, p. 187.
- § 2. Consequences of the theory of total *renvoi*, p. 191.
- § 3. Unitary and composite systems of law, p. 194.
- § 4. The national law of a British subject, p. 197.
- § 5. General observations and exceptions, p. 208.

In the latest English case on the doctrine of the *renvoi* (*a*), an English court, having found that the *de cuius* was domiciled at the time of her death in Italy, decided that the proper law governing the succession to her movables situated in England was the law of Eire. This choice of law seems on its face to be so lacking in any real or substantial foundation that it is worth while to consider whether there are any grounds, practical or theoretical, that can possibly justify the result reached.

#### § 1. Rejection of Renvoi, Theory of Partial Renvoi and Theory of Total Renvoi.

If, with regard to a particular question arising in a court of country X, a conflict rule of the law of X refers to the law of country Y (in its character as the *lex domicilii*, or as the case may be), and if, with regard to a similar question, the corresponding conflict rule of the law of Y refers to the law of X, there is what may be called a conflict of conflict rules (*b*), and

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\*This chapter reproduces an article bearing the same title, published (1941), 19 Canadian Bar Review 311-334. The postscript to that article (on *Renvoi* and Characterization) has been transferred to chapter 6, § 2.

(*a*) *In re O'Keefe, Poingdestre v. Sherman*, [1940] Ch. 124. The judgment as reported in the *Law Reports* differs in some respects from the earlier version reported in 162 L.T. 62, 56 Times L. R. 204, 109 L.J. Ch. 86 and [1940] 1 All E.R. 216; *cf.* note (w) in § 4, *infra*. As to the facts, see § 4, *infra*.

(*b*) A conflict of conflict rules may arise in any one of the three successive stages of characterization of the question, selection of the proper law and application of the proper law. My own suggestions as to the existence of these three logical stages in the court's enquiry, and as to the different kinds of conflicts of conflict rules arising in these stages respectively, are contained in chapter 3; *cf.* chapter 8, § 2.

the court of X might do any one of three things (c), according to its particular attitude towards the doctrine of the *renvoi*:

(1) The court of X might apply the domestic law of Y, that is, the law of Y appropriate to a similar question arising in a purely domestic situation in Y, or, in other words, the law of Y appropriate to the actual situation presenting itself to the court of X except that it is divested of any of the place elements which have given rise to the problem of conflict of laws, so as hypothetically to become a domestic situation localized in Y which presents itself to a court in Y. According to this view the court of X rejects the doctrine of the *renvoi* and decides that the conflict rule of X bears its natural meaning, and that effect is to be given to the forum's selection of the law of Y without regard to the conflict rules of the law of Y or any doctrine of the *renvoi* prevailing in the law of Y.

(2) The court of X might give effect to the conflict rule of Y in the sense that the court accepts the reference back from the law of Y to the law of X and applies the domestic law of X without considering what, if any, theory of the *renvoi* is included in the conflict rules of Y, that is, without considering whether, if a similar question arose in Y, a court of Y would itself give effect to the conflict rule of X by which the proper law is the law of Y. According to this view the court of X adopts what may conveniently be called a theory of partial, imperfect or pseudo *renvoi*.

(3) The court of X might give effect to the conflict rule of Y as it would be applied by a court of Y to the same situation, including whatever theory of the *renvoi* prevails in the conflict system of Y, so that the court of X decides the case exactly as the same case, including all the actual place elements of the situation, would be decided by a court in Y if the case arose there. According to this view the court in X adopts

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(c) As to the three-fold character of the choice which confronts a court, cf. Cheshire, *Private International Law* (1st ed. 1935) 132-135, (2nd ed. 1938) 47-56; Morris, *The Law of the Domicil* (1937), 18 *Brit. Y.B. Int. Law* 32, at pp. 33-34. The somewhat different language of my own restatement, in the text, of the three possible views is designed to present the problem in such a way as to lead on to the subsequent discussion of some of the difficulties raised by the English cases. While I think that as a general rule a reference to a foreign law by a conflict rule of the forum should be construed as a reference to the domestic foreign law, I would admit larger classes of exceptional cases than the authors above mentioned seem disposed to do. See § 5 of the present chapter, *infra*, and chapter 8, § 6.

what may conveniently be called a theory of total, perfect, true or integral *renvoi* (d).

It is of course possible that a court of Y, in deciding a similar case, might adopt any one of the three theories above mentioned with regard to the doctrine of the *renvoi*, that is, it might (1) reject the doctrine altogether, (2) adopt a theory of partial *renvoi*, or (3) adopt a theory of total *renvoi*. If the conflict rules of X and Y are in agreement in both adopting theory (1) or in both adopting theory (2), a similar case would be decided in different ways in the two countries. If they are in agreement in adopting theory (3), no logical solution is possible (e). If, on the other hand, the conflict rules of X and Y adopt different theories with regard to the *renvoi*, the courts of the two countries may reach similar conclusions in similar cases, but this satisfactory result is purely fortuitous, in that it depends, paradoxically, upon the fact that at least one of the two systems of law has a defective theory of the *renvoi* (f). Two different theories cannot both be right, though they may both be wrong.

As found by Luxmoore J. in *In re Ross* (g), the law of Italy adopts theory (1) above mentioned, that is, it rejects

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(d) Cf. De Nova, *Considerazioni sul Rinvio in Diritto Inglese* (1938), 30 *Rivista di Diritto Internazionale* 388 ff.

(e) There does not appear to be any English case in which the English court has attempted to apply its theory of total *renvoi* to the law of a foreign country which itself adopts a theory of total *renvoi*.

(f) Cf. De Nova, *op. cit.*, 411; Maury, *Règles Générales des Conflits de Lois*, *Recueil des Cours Académie de Droit International*, vol. 57, (1936, III) 539: "Il est au moins surprenant qu'un système de portée logiquement générale ne puisse éviter la contradiction que par une application limitée, réduite, que la victoire en tous pays de la conception jugée la meilleure en doive marquer le définitif abandon." Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws* (1941), 50 *Yale L.J.* 743, at p. 753: "Personally, I cannot approve a doctrine which is workable only if the other country rejects it. Apart from that, I do not favour handing over our conflicts problems to so-called experts on foreign private international law. It is difficult enough to get accurate expert testimony with respect to foreign municipal law, but such testimony is much more unreliable with respect to foreign conflict of laws. For these reasons I should still regard the general acceptance of the *renvoi* doctrine in our law as most unfortunate."

(g) [1930] 1 Ch. 377, at pp. 403-404. As to the *Ross* case, cf. chapter 7, § 6(5)(b). The law of Italy was of course a matter of fact in the English court, and it is possible that in another case, on the evidence of other expert witnesses, an English court will take some other view of the Italian law relating to the *renvoi*. It is at least probable that Luxmoore J.'s view of the Italian law does not

the doctrine of the *renvoi*, so that when one of its conflict rules says that succession to movables is governed by the national law of the *de cuius*, the domestic rules of the national law are to be applied. In supposed compliance with the Italian conflict rule, the English court, adopting theory (3)—the total *renvoi*—applied domestic English law to a question of the intrinsic validity of a will of movables made by a testatrix of English domicile of origin who was at the time of her death a British subject domiciled in Italy. The same result would have been reached if the English court had adopted theory (2), but would of course have been different if the English court had adopted theory (1).

On the other hand French law, as found by Russell J. in *In re Annesley* (*h*) and German law, as found by Maugham J. in *In re Askew* (*i*), adopt theory (2), that is, the theory of partial *renvoi*. In the first case, when the French conflict rule refers the question of the intrinsic validity of a will of movables to the law of the domicile (in the French sense) of the *de cuius*, namely, English law (*j*), and the English conflict rule refers the same question to the law of the domicile (in the English sense), namely French law, then French law accepts the reference back from English law and applies domestic French law. Accordingly, the English court, adopting theory (3)—total *renvoi*—applied domestic French law. In the second case, when the German conflict rule refers the question of legitimation by subsequent marriage to the national law of the father of the *de cuius* (*k*), but German law will accept a reference back from the

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correspond with what an Italian court would in fact do in the case of a reference by Italian conflict rules to the "national law" of a *de cuius* who at the time of his death was a British subject domiciled (in the English sense) in Italy. This question will be further discussed below. See notes (j) ff. in § 4, *infra*.

(*h*) [1926] Ch. 692; *cf.* chapter 7, § 6(4) (d).

(*i*) [1930] 2 Ch. 259; *cf.* chapter 7, § 7(1) (3).

(*j*) In the *Annesley* case the French conflict rule was, inaccurately, said to refer to English law *qua* national law of the *de cuius*, and the judgment in this case, like that in the *Ross* case, ignores the difficulties inherent in a reference to the national law of a British subject.

(*k*) The construction of the reference by the German conflict rule to the "national law" of the father of the *de cuius* as being a reference specifically to English law encounters the same logical difficulties as does the construction of the reference in *In re Ross* (note (n) in § 4, *infra*) by the Italian conflict rule to the national law of the *de cuius* as being a reference to English law. See note (r), *infra*.

national law to German law as the law of the domicile, the English court, adopting theory (3), applied domestic German law, with the result that an adulterine child was held to be legitimated (1), although there would have been no legitimation by domestic English law. The same result would have been reached if the English court had applied theory (1), that is, if the English court had rejected the doctrine of the *renvoi* and said that the reference of the English conflict rule to the *lex domicilii* is a reference to the domestic rules of the domicile (m), but of course a different result would be reached if the English court adopted theory (2)—the partial *renvoi*—and in that event the English court on the one hand, and the French or German court on the other hand, would each apply the domestic law of the forum (n).

## § 2. Consequences of the Theory of Total Renvoi.

The three leading modern English cases already mentioned—the *Ross*, *Annesley*, and *Askew* cases (o)—present, superficially, a doctrine which has a certain measure of coherency, a doctrine of total *renvoi*, the result in each case in the English court depending supposedly on the particular doctrine of the *renvoi* which prevails in the conflict rules of the foreign proper law, that is, in each of these three cases, the law of the country of domicile (in the English sense). The question whether this doctrine is theoretically or practically justifiable is one upon which it is possible to write from many points of view. The purpose of the present chapter is to draw attention to one aspect of the subject, namely, that a court which adopts the doctrine of the total *renvoi*, in whatever form it may be expressed, imposes upon itself the duty of giving effect to

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(1) A point not noticed by Maugham J. in the *Askew* case is that the child, even though legitimated, was not a child of the second marriage within the terms of the power of appointment there in question. On this point the decision seems to be inconsistent with *In re Wicks' Marriage Settlement*, [1940] Ch. 475: cf. comment (1941), 19 Can. Bar Rev. 44

(m) Russell J. in the *Annesley* case expressed his personal preference for this mode of solving the problem, and Maugham J. in the *Askew* case thought that there was "much to be said" for the "simple and rational solution" suggested by Russell J.

(n) This prediction as to what a French or German court would do is based on the assumption that French and German law adopt theory (2) as stated above and as found in the *Annesley* and *Askew* cases.

(o) See notes (g), (h) and (i), *supra*.

whatever would be decided in a particular case by a court of the country to the law of which reference is made by the conflict rule of the forum (*p*), and if the court is misinformed as to the foreign law or fails to interpret accurately the evidence of the foreign law, the supposed application of the doctrine of the total *renvoi* may lead to a grotesque result or a miscarriage of justice. It does not appear, on an examination of the leading modern cases already mentioned and other cases, that English judges have adequately performed the duty which they have assumed, or have even realized that the adoption of the doctrine of the total *renvoi* involves the assumption of that duty. Consequently the discussion of the *renvoi* doctrine by English judges is sometimes distinguished by a certain measure of *naïveté*—a certain unawareness of the nicety of the problems implicit in the method of solution adopted or a tendency to regard that solution as simpler than it really is. Part of the fault may probably be attributed to the existence of the rule of English conflict of laws that foreign law is treated as a matter of fact which must be proved by the party who relies on a provision of foreign law. This rule is not so bad, though not wholly satisfactory, when the foreign law to be proved is foreign domestic law, but even in that case there exists the danger that the evidence of a foreign expert, or a statement of foreign law agreed on or accepted by the parties, may not relate strictly to the domestic rules of the foreign law but may be confused by reference to the conflict rules of the foreign law (*q*).

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(*p*) This *foreign court theory* is exactly what the court in the *Ross* case purported to apply, whereas in the *Annesley* case the court adopted a mixture of this theory and the *ping-pong* or *lawn tennis theory*, and in the *Askew* case the court adopted the *acquired rights theory*. See chapter 8, § 5, where some of the difficulties inherent in each of these theories are discussed. All three theories may be described as variants of the doctrine of total *renvoi* now under discussion.

(*q*) In this respect a foreign judgment may be misleading evidence of the foreign law unless the reasons for judgment distinguish between the domestic rules and the conflict rules of the foreign law. It is submitted that when the House of Lords in *Dogliani v. Crispin* (1866), L.R. 1 H.L. 301, decided that the Court of Probate in England was bound to follow the judgment of the court of the domicile, this involved merely the acceptance of the domiciliary court's exposition of the domestic law of the domicile, the case being a purely domestic one in the court of the domicile. So far as Lord Cranworth stated that the court of the domicile had exclusive *jurisdiction* with regard to the *administration* of the estate, that is, even as to the English assets, he merely repeated the erroneous statement which

On the other hand, when the evidence of the foreign law relates or is intended to relate to foreign conflict rules, including the particular doctrine of the *renvoi* adopted in the foreign law, the danger of misunderstanding exists all along the line from the parties or their advisers who are not likely to understand in advance exactly what is to be proved, through the expert witnesses who may not be really expert in the intricacies of the *renvoi* doctrine, to the English judge who may thus be furnished with insufficient material for a decision with regard to the foreign law and who may not even be aware of the insufficiency of the material.

The affidavit of Dr. Rost, "accepted by all parties as being correct" in the *Askew* case (*r*), and apparently accepted by Maugham J. as satisfactory proof of German law, may be mentioned *en passant* as an example of evidence which discloses on its face that the witness with regard to the foreign law was not aware of the inherent difficulty of a reference by a German conflict rule to the national law of a British subject domiciled in Germany. He says "I am informed and believe that John Bertram Askew was an Englishman. Therefore English law would be applied by the German court in deciding the question." Askew was an "Englishman", however, only because his domicile of origin was English, whereas the reference by the Ger-

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he had already made in *Enohin v. Wylie* (1866), L.R. 1 H.C. 1, and which was disapproved in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, at p. 502.

Even as regards domestic rules of foreign law the proof adduced, or a statement agreed on, may be defective. An unfortunate aspect of the rule that foreign law is a matter of fact which must be proved is that in the absence of proof the foreign law is presumed to be identical, at least apart from statutory changes, with the law of the forum. It is obviously not satisfactory that a court should act on a statement of the foreign law, or a presumption of foreign law, which it knows or has the means of knowing to be false. *Cf.* chapter 45. Another curious point suggests itself in this connection. If a court adopts the theory of total *renvoi*, that is, if it says that a reference by a conflict rule of the forum to a foreign law is a reference to whatever law a court of that country would apply, then the foreign law to be proved includes the conflict rules of the foreign law and the foreign court's particular theory of the *renvoi*. Therefore, if the domestic law of the foreign country is proved to be different from that of the forum but no evidence is given of the foreign conflict rules or the foreign theory of the *renvoi*, these should be presumed to be identical with those of the forum, and no logical conclusion is possible: see note (e), *supra*.

(*r*) [1930] 2 Ch. 259, at p. 276. As to a similar patent error of a witness as to Italian law, see *In re Ross*, [1930] 1 Ch. 377, at pp. 403-404: note (n) in § 4, *infra*.

man conflict rule was to the "national law" of the *de cujus*. How the witness transformed a reference to the law of a British subject, whatever that means, into a specific reference to the law of England is not explained. The witness does not purport to tell the English court how a German court would construe a reference to the national law of a British subject, which was what the case required, but merely says what a German court would do in the case of a person who as the witness is informed and believes "was an Englishman".

A similar inherent difficulty arises in the case of a reference by an Italian conflict rule to the national law of a British subject domiciled in Italy. As the Italian law was in question in both the *Ross* case (*s*) and the *O'Keefe* case (*t*), it may be worth while to consider more attentively than the English courts have done what an Italian court would probably do in a situation in which at the material time the *de cujus* was a British subject domiciled (in the English sense) in Italy, the matter being one which by the English conflict rule is governed by the domiciliary law of the *de cujus* and by the Italian rule is governed by his national law.

### § 3. Unitary and Composite Systems of Law.

A conflict rule may refer

(1) to the law of a territorial unit which has a unitary system of territorial law, that is, which is a single law district, or

(2) to the law of a particular law district within a larger territorial unit which includes two or more law districts and may therefore be said to have a composite system of territorial law, or

(3) to the law of a territorial unit which has a composite system of personal law (*u*).

The significance of the foregoing classification may be considered, first, from the point of English conflict of laws or any other system in which domicile, not nationality, is the criterion of personal law or, in other words, in which domicile

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(*s*) See notes (*g*), (*r*), *supra*.

(*t*) See note (*a*), *supra*.

(*u*) This tripartite classification is stressed in Grassetti, L'Art. 9, Disp. Prel. Cod. Civ., la Forma dei Testamenti ed un pretesa Caso di Applicazione della Teorica del Rinvio (1935), 5 Rivista di Diritto Privato, n. 1, with particular references to a case falling within (3).

is the connecting factor in a given situation, and, secondly, from the point of view of Italian conflict of laws or any other system in which nationality, not domicile, is the criterion or connecting factor.

If an English conflict rule refers to the law of the domicile of the *de cujus*, the reference in either (1) or (2) is clearly to a territorial unit in which a single system of law peculiar to it prevails, that is, a separate "law district" (*v*), and it is immaterial whether that district is coextensive with a national political unit, as in the case of Denmark, Brazil, France, Italy or Germany (*w*), or is merely one part of a larger political unit, as in the case of England, Scotland, Ontario, Quebec, New York or Pennsylvania. The reference to a distinct law district by the English rule is unequivocal, and the question whether the reference is to be construed as a reference to the domestic rules or as a reference to the conflict rules of the law of that district is a question of the construction of the conflict rule which may be answered in either of the two senses without affecting the unequivocal character of the reference so far as it indicates a particular law district.

In other words, in (1) and (2), the reference by the English conflict rule to the law of the domicile is unequivocal in its indication of the law of a particular law district as the proper law, but the reference may be either to the domestic rules or to the conflict rules of that law, according to the forum's particular theory with regard to the *renvoi*. In (3), however, not only is the reference to the law of a particular law district unequivocal, but the reference is unequivocal also in another sense. The question whether the reference is to the domestic rules or the conflict rules of that law does not arise, and therefore no question as to the *renvoi* arises. If the country to the law of which reference is made by an English conflict rule is one which (at least with regard to the matter in question, as, for example, succession to movables) has no system of

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(*v*) Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938) 6, 7.

(*w*) The existence of the territorial divisions of Europe as of 1933 being assumed for the purpose of the present discussion, and the overseas possessions of France and Italy, and Alsace-Lorraine, likewise being disregarded for the same purpose, France, Italy and Germany are standard examples, frequently occurring in English cases, of countries with unitary systems of law, each of these countries being governed by a single civil code and being a single law district.

territorial law, (that is, it has not a system of domestic rules applicable normally to all cases which contain no foreign element in addition to a system of conflict rules for cases which contain a foreign element or foreign elements), but only a system of special rules applicable to different classes of persons on the basis of race, religion, caste, nationality, etc., it is obvious that the reference to the law of the country must mean the personal law of the *de cujus*, ascertained by the rules of law of the country. The personal law of the *de cujus* so ascertained is part of the domestic law of the country—the only domestic law applicable to the case—and the fact that the domestic law of the country takes the form of incorporating the rules of law of some other country does not mean that an English court, in applying rules of law so incorporated by reference, is adopting the theory of the *renvoi*. There is and can be in the circumstances no election by the English court between the domestic rules and the conflict rules of the proper law.

The failure to observe the distinction between a reference by a conflict rule to the law of a country which has a territorial system of law and a reference to the law of a country which has a composite system of personal law underlies a good deal of misunderstanding of certain cases and the unjustifiable citation of such cases in support of the doctrine of the *renvoi*. If the court is not an English court, but the Privy Council, hearing an appeal from a country which has a composite system of personal law, and of course bound to decide the case as if it were sitting in that country, and the question in issue is referred in the particular circumstances by the law of that country to English law, it is obvious that the Privy Council, in applying English law, does not do so by virtue of the doctrine of the *renvoi* (x).

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(x) The distinction stated in the first sentence is pointedly discussed by Grasseti, *op. cit.*, note 22, *supra*. It is completely ignored by Keith, editor of the 5th edition (1932) of Dicey on the Conflict of Laws, in the erroneous use that he makes of *Bartlett v. Bartlett*, [1925] A.C. 377, in the appendix, note 1, Meaning of "Law of a Country," and the Doctrine of the *Renvoi*, at p. 876, under the sub-heading "The Renvoi and Extra-territorial Jurisdiction," and note 26, The Case of *Bartlett v. Bartlett* (p. 981). In a review of the 5th edition of Dicey in the Journal of the Society of Public Teachers of the Law (1932) 54, Vesey-Fitzgerald says: "It seems a pity that cases on extra-territorial jurisdiction should be classed together with those on the so-called *circulus inextricabilis* under the general head of *renvoi*. The rule which [Keith] quotes from the judgment in *Bartlett v. Bartlett* was common ground of both parties, only recited

## § 4. The National Law of a British Subject.

If we turn next to consider the significance of the tripartite classification above stated (namely, respective references to the law of territorial units having (1) a unitary system of territorial law, (2) a composite system of territorial law, and (3) a composite system of personal law), from the point of view of Italian conflict of laws or any other system of conflict of laws in which nationality, not domicile, is the criterion of personal law (*a*), we may for the purpose of the present chapter confine the discussion to a case falling within item (2) of the classification. It is true that some day there may be a case in which an English court, on being referred by its conflict rule to the law of Italy, will take upon itself the burden of following a further reference by an Italian conflict rule to the law of a third country, Utopia, and Utopia may be a country falling within either item (1) or item (3) of the classification. We may, however, leave that contingency to be considered when such a case arises (*b*), with the view of concentrating attention

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in the judgment as introducing the real issue between them." The reviewer suggests that on p. 983 Keith supplies the answer to his criticism of my view stated in (1931) 47 L.Q. Rev. 271, at p. 285, [1932] 1 D.L.R. 1, at pp. 37-38, that the Privy Council simply construed the relevant order-in-council and applied the particular kind of domestic Egyptian law appropriate to the claim, namely, Moslem law, not English law. See also *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, and *Casdagli v. Casdagli*, [1919] A.C. 145, already discussed in chapter 7, § 7(3); cf. Abbott (1908), 24 L.Q. Rev. 133, at p. 143; *In re Ross* [1930] 1 Ch. 377, at p. 398. Whether the country from which the Privy Council hears an appeal is or is not a country with a composite system of personal law, it is sometimes overlooked, even by the Privy Council itself, that the Privy Council is not an English court and that the law to be administered is that of the country from which the appeal is heard, and not the law of England. See chapter 10 (supplementary observations).

(*a*) The necessity for considering the point of view of the foreign system of conflict of laws arises of course from the fact that some English judges have adopted the theory that it is the duty of an English court, when directed by an English conflict rule to the law of a given foreign country, to take into account the conflict rules of the foreign country; and the following analysis of the problem which would confront a court of the foreign country is intended to test the theoretical and practical value of this theory.

(*b*) If Utopia were (1) a country with a unitary system of territorial law, the case would be relatively free from difficulty, because the Italian reference to the national law of the *de cujus* would clearly point to a country which is a political unit as well as being a single law district. If Utopia were (3) a country with a composite system of personal law, there might be more difficulty in ascertaining what an Italian court would do. If Utopia were (2) a country with a composite system of territorial law, as, for example, the United

on the question already raised by English cases, but not adequately considered in those cases, namely, how an Italian court would construe a reference to the national law of a national of a territorial unit with a composite system of territorial law, or, specifically, the national law of a British subject (*c*). The Italian court, having ascertained the nationality of the *de cujus* to be British, and having been informed of the existence of various systems of law within the British Empire, would encounter a difficulty in selecting one of these systems as the proper law—a difficulty of which the draftsmen of the Italian conflict rules (referring to the “national law”) were apparently unaware (*d*), and which is logically insuperable—namely, that a reference to the national law of a British subject does not in itself afford any guide to the selection of the law of any specific law district from the numerous law districts composing the British Empire. There is of course no general “British” law of succession to movables or of any other matter which might be governed by the personal law of an individual person, so that the reference to the national law of a British subject is in effect meaningless.

It may be observed parenthetically that whereas a reference to the national law of a citizen of the United States of America would be futile because it does not point to a particular state of the Union, in the case of the British Empire, even the larger units of the composite Empire, such as the United Kingdom, Canada, Australia, etc., are themselves composite units, each consisting of various law districts, so that an Italian court, even if it got so far as to construe a reference to the national law of a British subject as meaning in a specific case the law of Canada, would still have reached no solution unless it could find some way of selecting the law of a particular province of Canada as being indicated by the reference to the national law of a British subject. As was stated (with particular reference to domicile and rights dependent on dom-

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States of America, the difficulties inherent in the Italian reference would be the same as those inherent in an Italian reference to the national law of a British subject, to be discussed in the text. See Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 237, 241.

(*c*) For a detailed discussion from the Italian point of view, see De Nova, *Il Richiamo di Ordinamenti Plurilegislativi: Studio di Diritto InterloCALE ed Internazionale Privato* (1940).

(*d*) It would appear that the draftsmen had in mind only a reference to a country with a unitary system of law.

icile) by Lord Merrivale, delivering the judgment of the Privy Council in *Attorney-General for Alberta v. Cook (e)*, it is only in an individual province of Canada, not in the Dominion of Canada as a whole, that are found uniformity of law, civil institutions existing within ascertained territorial limits and juristic authority in being there for the administration of law. Thus the British Empire is doubly composite, or composite to the second degree.

It happens that in the Italian system of the conflict of laws the doctrine of the *renvoi* is rejected (*f*), and therefore the reference by an Italian conflict rule to the national law of a person is construed as a reference to the domestic rules of the proper law, but the reference to the national law of a British subject is equally ineffective, whether the conflict rules or the domestic rules of some system of law are to be applied, because the Italian conflict rule affords no indication of any particular system of law within the British Empire, and has to be supplemented by some device for selecting that particular system. If the question is one which by universal agreement among the conflict systems of the British Empire is governed by the *lex domicilii*, and the *de cujus* was domiciled at the material time in some part of the British Empire, as, for example, in a particular province of Canada or in a particular unit of the United Kingdom, an Italian court might say that the reference to the national law of a British subject means the law of that part of the British Empire in which the *de cujus* was domiciled, thus using the supposititious universal "British" conflict rule as an interprovincial or interregional conflict rule, as distinguished from an international conflict rule, without abandoning its general anti-*renvoi* attitude, that is, without abandoning its doctrine that an Italian court is concerned with the domestic rules, not the conflict rules, of a foreign proper law. Apart from the fineness of the distinction between private interna-

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(e) [1926] A.C. 444, at p. 450, [1926] 2 D.L.R. 762, at p. 765, [1926] 1 W.W.R. 742, at p. 745. Some account is given in chapter 11, § 1, of nationality within the British Empire, and of the Canadian Citizenship Act, 1946, which created a separate Canadian nationality within the framework of a common British nationality. The statute in question does not materially change the situation stated in the text, because, as there pointed out, a reference to "Canadian" law is as meaningless as a reference to "British" law for the purpose of indicating a particular law district in the conflict of laws.

(f) See chapter 7, § 6(5)(b), note (f), in the course of the discussion of *In re Ross*, [1930] 1 Ch. 377.

tional law and private interprovincial or interregional law,—a distinction which is not drawn in Anglo-American conflict of laws—a substantial objection to the suggested construction of the Italian conflict rule lies in the fact that there is in fact no system of conflict of laws common to all parts of the British Empire (*g*). While the English system prevails, broadly speaking, in many parts of the Empire, that is, in the common law units, there are substantial differences between the English system of conflict of laws and the systems prevailing in, for example, Quebec, Scotland and the provinces of South Africa. In the matter of succession to movables, the primary rule in Quebec is that the *lex loci actus*, not the *lex domicilii*, governs the formal validity of a will, and a Quebec court might, as regards a question governed by the *lex domicilii*, arrive at a different conclusion as to the domicile of the *de cuius* from that which would be reached in a common law province (*h*). Even in the common law provinces there are diverse versions or modifications of Lord Kingsdown's Act (*i*). These are merely examples showing the non-existence of a uniform "British" system of conflict of laws. Obviously, an Italian court would not be justified in resorting to the conflict rules of England in order to decide, and before deciding, that the Italian conflict rule refers to the law of England rather than to the law of some other part of the British Empire.

If we pass now from the case of a *de cuius* who was a British subject domiciled at the time of his death in some part of the British Empire to the case of a *de cuius* who was a British subject domiciled at the time of his death in some country outside the British Empire, then there arises an almost insoluble problem to be solved by the court of the domicile (which we may suppose, for the purpose of discussion to be an Italian court), and consequently to be solved by an English court which, by reason of the Italian domicile of the *de cuius*, has

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(*g*) This fact is observed by De Nova, *op. cit.* (note (*c*), *supra*) 151, citing *inter alia*, Baty, *Polarized Law* (1914), p. 119 ("There is no common British law of succession for the whole Empire; there is not even a common British rule for the choice of a law of succession, for any colony might any day abandon the test of domicile and indeed some of our possessions have already done so for, at any rate, some purposes."), and p. 32 ("In the same way, each legislature may adopt its own system of Private International Law.").

(*h*) See Johnson, *Conflict of Laws*, vol. 1 (1933) 91, 119-121, vol. 3 (1937) 1.

(*i*) See chapter 23.

undertaken the task of ascertaining how an Italian court would construe a reference by an Italian conflict rule to the national law of the *de cujus*. An Italian court might conceivably do any one of three things, namely:

(1) It might apply domestic Italian law *qua lex fori* on the ground that the reference by the Italian conflict rule to the national law of the *de cujus* is meaningless or ineffective in the circumstances.

(2) It might apply domestic Italian law *qua lex domicilii* on the theory that it is giving effect to a supposititious British conflict rule referring to the law of the domicile.

(3) It might apply the domestic law of that part, if any, of the British Empire in which the *de cujus* had his domicile of origin.

Of these three possible solutions the first would seem to be the best. It does not involve an Italian court in the doctrine of the *renvoi*, but does involve its frank acknowledgment of the failure of the Italian conflict rule to indicate any ascertainable law district within the area of the British Empire which might, by the subsidiary use of domicile as a connecting factor, furnish the law answering to the Italian reference to the national law of the *de cujus*. It would appear that this solution is likely to prevail in Italy in the future, as Italian courts will be fully informed, by Italian writers on the conflict of laws, of the impossibility of giving effect to a reference by an Italian conflict rule to the national law of a British subject who dies domiciled in Italy (*j*).

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(*j*) This is the solution advocated by Grassetti, *op. cit.* (note (u) in § 3, *supra*) 7. De Nova, *op. cit.* (note (c) in § 4, *supra*), mentions (p. 26), as a situation which gives rise to peculiar difficulty, a reference to the national law of a national of a country with a composite system of territorial law and no unitary system of interregional conflict of laws. He comes subsequently (p. 81) to the discussion of this situation, and arrives in due course (p. 107) at the special problem arising when the *de cujus* is not connected by any available criterion with any particular part of the state of which he is a national, but is connected rather with some other state, a problem raised in the specific situation of a British subject domiciled in Italy. He discusses (pp. 108 ff.) two cases decided some 20 years ago in Italian courts, proceeding to a discussion of the views of various authors. He concludes (pp. 149 ff.) with a systematic discussion of the various methods proposed for the solution of the difficulties inherent in a reference to a composite system of law which lacks a unitary or uniform system of interregional conflict of laws. De Nova's own opinion (p. 185) is that in such case the *de cujus*, whose national law furnishes no guide for the solution of the problem, should be regarded as a person without nationality. On this basis,

The second solution is indefensible in so far as it is based on a supposititious but in fact non-existent British conflict rule (*k*). It would be equally indefensible if it were based on an English conflict rule, erroneously supposed by an Italian court to be applicable to the case either on the theory that English law is the dominant law of the British Empire or on the theory that the Italian conflict rule refers to a non-existent "English" nationality (*l*). This solution is less likely to be adopted in the future as Italian courts become better informed with regard to British nationality and the diversity of laws within the British Empire. This solution is also objectionable from the Italian point of view because it would involve an Italian court's admitting an exception to the prevailing anti-*renvoi* theory of Italian conflict of laws.

The third solution is indefensible from any point of view. If the *de cujus* had his domicile of origin in England and had a domicile of choice in Italy at the time of his death, then, from the English point of view, his domicile of origin, having been superseded by his domicile of choice, is immaterial to the succession to his movables, unless an English court, thinking that it must apply to the case whatever law an Italian court would apply, is convinced by satisfactory evidence that an Italian court would apply the law of the domicile of origin of

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in the case of a British subject domiciled in Italy, an Italian court would apply domestic Italian law.

(*k*) Attention has been drawn earlier in the present chapter to the non-existence of any "British" conflict rule or even of uniformity of conflict rules in different parts of the British Empire. See notes (*g*), (*h*), (*i*), *supra*.

(*l*) As regards the theory that a reference to the national law of a British subject indicates specifically English law, Pollock, (1909), 25 L.Q. Rev. 157, says: "The fallacy about England and English law having some kind of official predominance in the British Empire appears to be hard to eradicate," and in an editorial note to *In re Askew*, [1930] 2 Ch. 259, at p. 269, referring to Maugham J.'s use of the expression "law of England", says: "A compendious name for the result of allegiance to His Britannic Majesty: there is no suggestion in the present case of any presumption that a British subject's personal law is that of England rather than any other part of the Empire. Such a suggestion has been made elsewhere, but, it is submitted, without foundation." The equally fallacious theory that a reference to the national law of a British subject can be converted into a reference to English law by describing the nationality as English has sometimes made its appearance in the evidence given by Italian experts in English courts, and has misled English judges (see note (*r*) in § 2, *supra*, and note (*n*), *infra*); it has also given rise to misunderstanding on the part of Italian judges: cf. De Nova, *op. cit.* (notes (*c*) and (*j*), *supra*) 137.

the *de cujus*. From the Italian point of view, it is almost incredible that an Italian court, if it were well informed with regard to the composite character of the British Empire and the diversity of both domestic and conflict rules of law prevailing therein, would reach the conclusion that the reference by an Italian conflict rule to the national law of the *de cujus* means a reference to the law of his domicile of origin (*m*). Strange to say, English courts have on several occasions, in situations identical with or similar to that which is now under discussion, applied the law of the domicile of origin, sometimes without any evidence as to how a court of the domicile would construe its reference to the national law of the *de cujus*, sometimes on evidence which was vitiated by errors apparent on the face of the witnesses' statements. An example of evidence of this kind is afforded by *In re Ross* (*n*). Two of the three witnesses said that "the Italian courts would determine the case on the footing that the English law applicable is that part of the law which would be applicable to an English national domiciled in England." Apparently it did not occur to Luxmoore J. to inform the witnesses that there was no such person as an "English national", and that if "British national" were substituted for "English national", in accordance with the reference by the Italian conflict rule to the "national law" of the *de cujus*, there would be no foundation left for a reference specifically to the law of England (whether domestic rules or conflict rules) as distinguished from the law of any other part of the British Empire. Nor did it occur to Luxmoore J., apparently, to inform the witness that there was no rule even of English law (whether domestic rule or conflict rule) that the domicile of origin, which had been

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(*m*) The fact that in the past an Italian court may have so construed the reference, or even, in the case of a British subject having both his domicile of origin and his domicile of choice in Italy, may have construed the reference as a reference to English law because the family of the *de cujus* was of English origin (*De Nova, op. cit.*, 135-136), does not render it probable that an Italian court would so construe the reference today. An Italian court today would probably be aware that any reference to the domicile of origin of the *de cujus* would be inconsistent with the English conflict rule that the law of his domicile at the time of his death governs the succession to his movables. As Dicey once remarked (19 L.Q. Rev. 244), whatever the words "law of his domicile" mean, they do not mean the law of his domicile of origin as such.

(*n*) [1930] 1 Ch. 377, at pp. 403-404. As to a similar patent error of a witness with regard to German law, see *In re Askew*, [1930] 2 Ch. 259, at p. 276: note (*r*) in § 2, *supra*.

superseded by the domicile of choice, would have any bearing on the distribution of the movables of the *de cuius*. If the witness had been informed of these matters and cross-examined on them, they might well have come to a different conclusion. Again, if, in a future similar case, a witness with regard to Italian law is fully informed about the British Empire and its systems of law, and about British nationality, he might well say that an Italian court would apply the domestic law of Italy. In other cases English courts have applied the law of the domicile of origin of the *de cuius* without any evidence at all that a court of the domicile would construe a reference to the national law of the *de cuius* as a reference to the law of the domicile of origin. For example, in *In re Johnson* (o), a case in which the *de cuius* was domiciled at the time of her death in Baden, and the only evidence before Farwell J. was a finding of fact contained in a master's certificate (which was binding on all parties because there had been no summons to vary) that "according to the law of Baden, the legal succession to the property of the deceased of which she has not disposed by will is governed solely by the law of the country of which the testatrix was a subject at the time of her death". Without a shred of evidence on the question of the meaning which a court of Baden would attribute to this reference to the national law of a British subject, Farwell J. applied the law of the domicile of origin of the *de cuius*, that is, the law of Malta. In the recent case of *In re O'Keefe* (p) there was little, if anything, more in the evidence. The *de cuius* was domiciled at the time of her death in Italy, where she had resided continuously for 47 years. Admittedly the Italian conflict rule said that the succession was governed by her national law. Crossman J. said: "Italian lawyers cannot say what is the meaning of the law of the nationality where there is more than one system of law of the nationality; but I have evidence, which I think is not disputed, from experts in Italian law that the Italian law would hold that the succession is regulated by the law of the country to which the intestate belonged, and belonged I think at the time of her death." On this lack or ambiguity of evidence the learned judge held that the succession was governed by the law of Eire, a political unit

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(o) [1903] 1 Ch. 821. For references to critical comments on this case, see note (u), *infra*.

(p) [1940] Ch. 124.

which had come into existence during the long residence of the intestate in Italy and of which she was not a citizen by the law of Eire itself, and a country which the intestate had never visited except on a "short tour" with her father 59 years before her death. By what process of reasoning Crossman J. selected the law of Eire as being the law of the country to which the *de cujus* "belonged" at the time of her death, is not clear (*q*), but it is clear that the process of reasoning was that of the judge and not that of the witnesses (*r*). *In re Johnson* was not cited in the judgment, although the two cases are strikingly similar, and whatever has been said by many persons in criticism of *In re Johnson* is equally applicable to *In re O'Keefe*.

The contrast between what Crossman J. did and what he purported to do is interesting. He purported to follow *In re Ross* (*s*) and *In re Askew* (*t*), but in each of these cases the English court did attempt, in accordance with the doctrine of the total *renvoi*, to give effect to the evidence of experts on the question what law would be applied by a court of the domicile (although that evidence was vitiated by patent error), whereas in *In re O'Keefe* there was no evidence that an Italian court would apply the law of Eire in the particular circumstances of the case. One might even suspect that Crossman J., purporting to follow the two earlier cases on a point of law, allowed himself to be influenced by the evidence of a matter of fact (Italian law) given in the *Ross* case, and thereby supplemented the evidence given in the *O'Keefe* case. In substance, however, what he did, without expressly saying that he was doing so, was to use at least one, and perhaps both, of the two lines of reasoning of Farwell J. in *In re Johnson* (*u*).

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(*q*) Cf. comment by J. H. C. Morris in (1940), 56 L.Q. Rev. 144.

(*r*) The result was unreal to the point of absurdity, because the law of the domicile of origin was not the law indicated as such by an English conflict rule or the law which the *de cujus* might have had in contemplation or the law which there was any reason to suppose an Italian court would have selected.

(*s*) [1930] 1 Ch. 377, note (n), *supra*.

(*t*) [1930] 2 Ch. 259, note (r) in § 2, *supra*.

(*u*) [1903] 1 Ch. 821. See critical comments: Dicey (1903), 19 L.Q. Rev. 244; Pollock, at first differing from Dicey and approving the decision (1903), 19 L.Q. Rev. 246, but subsequently converted to the view that both the grounds of decision are untenable (1920) 36 L.Q. Rev. 92; cf. (1915), 31 L.Q. Rev. 106-107, (1937), 53 L.Q. Rev. 200; Bate, Notes on the Doctrine of *Renvoi* in Private International Law (1904) 19 ff., 115 ff.; Abbott, Is the *Renvoi* a Part of the Common

In that case Farwell J. held that a domicile of choice in Baden was not effectually acquired because the law of Baden did not recognize the domicile of the *de cujus* in Baden for the purpose of succession to movables, and therefore the English court must fall back on the law of the domicile of origin. Notwithstanding the condemnation of this line of reasoning in *In re Annesley* (v), it was used by Crossman J. (w). Alternatively, Crossman J. followed in effect Farwell J.'s second line of reasoning, namely, that a reference by Italian law to the national law of a British subject domiciled in Italy means the law of that part of the British Empire in which the *de cujus* had her domicile of origin. As pointed out earlier, this conclusion was erroneously reached in the *O'Keefe* case and in the *Johnson* case without any evidence that an Italian court would have construed the Italian conflict rule in this sense, whereas in the *Ross* case and the *Askew* case, both cited by Crossman J., there was some, though insufficient, evidence of this kind (a). The learned judge's citations of Cheshire and Dicey were, to say the least, extremely casual. He appropriately cited, as supporting his view of the construction of the Italian conflict rule, a passage from the former (b), but ought to have pointed out that the same learned author does not think that the

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Law? (1908), 24 L.Q. Rev. 144-145; Brown, *In re Johnson* (1909), 25 L.Q. Rev. 145; Bentwich, *Law of Domicile in its Relation to Succession* (1911) 169-172; Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910), 10 Columbia L.R. 335-338; cf. Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country"* (1918), 27 Yale L.J. 509; Schreiber, *The Doctrine of the Renvoi in Anglo-American Law* (1918), 31 Harv. L. Rev. 554-557. For my own previous comments on the *Johnson* case, see chapter 7, § 6(4) (b).

(v) [1926] Ch. 692, at pp. 703-706, on the basis of older cases of authority.

(w) (1939), 162 L.T. 62, at p. 63: "Her domicile of origin, which was Southern Ireland, is something which remains in reserve ready to attach again whenever no other domicile arises. It is true that at her death her domicile was Italian and that I am bound to accept because that is the hypothesis on which the question arose, but removing the *Italian domicile* the only other domicile which she could have had was the domicile of Southern Ireland." The italics are mine. The quoted sentences are reported in almost the same words, in 56 Times L.R. 204, at p. 205, 109 L.J. Ch. 86, at p. 88, and [1940] 1 All E.R. 216, at p. 218, but are omitted from [1940] Ch. 124.

(a) See note (r) in § 2, and note (n), *supra*.

(b) Cheshire, *Private International Law* (2nd ed. (1938)) 161-162. On grounds already stated, it is submitted that there is no justification for the construction stated by Cheshire and apparently approved by Crossman J.; cf. notes (m) ff., *supra*.

English court should concern itself with the foreign conflict rule (c). In the case of Dicey, the reference is misleading, because that author, although he approves of the doctrine of the *renvoi*, expresses himself somewhat ambiguously with regard to what he calls the "decidedly ambiguous judgment" in *In re Johnson*, criticizing it on one page, and on the following page (d) making the suggestion (which, strange to say, is left without change or comment by Dicey's editor, Keith, himself a notable expert in the legal systems of the British Empire), that a reference by the law of the domicile to the law of a British subject may be construed as a reference to "English law, being the true national law of every British subject" (e).

If the leading cases discussed above are looked at from a purely practical point of view, it would appear that, at least as regards the intrinsic validity of a will of movables or succession to movables on intestacy, the results reached by English courts are such as to cast serious doubt on the desirability of the courts' perseverance in their attempt to follow the will-o'-the-wisp of the total *renvoi*, that is, the attempt to follow a foreign court in the application of the conflict rules of the foreign law, including the foreign court's theory of the *renvoi*. The results have been haphazard and accidental in the sense that admittedly in any future case relating to a situation substantially similar to that arising in a former case, new evidence with regard to foreign conflict rules may lead to a different result. The consequent unpredictability of result in any future case constitutes in itself a grave defect in the law. Furthermore the results reached have sometimes been unreal to the point of absurdity (as when the law of the domicile of origin has been applied under a conflict rule which says that the law of the domicile of the *de cuius* at the time of his death is to be applied), and at other times have merely coincided

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(c) Cheshire, *op. cit.*, pp. 47 ff.

(d) Dicey, *Conflict of Laws* (5th ed. 1932) 872-873.

(e) The error inherent in this mode of statement has been already pointed out in connection with the *Ross* and *Askeu* cases, note (r) in § 2, and note (n), *supra*. Only a few lines further on, in a note to Dicey's text (p. 873, note i) it is said, "As to succession there exists no national law applicable to every British subject, save the principles of the conflict of laws providing for the application to movables of the *lex domicilii* and to immovables of the *lex situs*." The saving clause appeared for the first time in the 5th edition (1932), and, it is submitted, is erroneous in so far as it suggests that there is a single or uniform British system of conflict rules relating to succession: cf. notes (g), (h) and (i), *supra*.

with the results that would have been reached by the direct application of the domestic rules of the *lex domicilii* (as is likely to happen in a future case in which the *lex domicilii* is the law of Italy). In no case does it appear that a result of obvious intrinsic merit has been reached solely by the use of the *renvoi*, at least in the field of succession to movables, nor does it appear that such result is more likely to be reached in the future by the use of the *renvoi*. With respect it is submitted that English judges have lost their way in a labyrinth into which they have gratuitously entered, and that in future, while the matter is still open, in the absence of any unequivocal decision of an appellate court (*f*) they should, as far as possible, save themselves the trouble of making imaginary journeys to foreign countries for the purpose of adjudicating as if they were foreign courts, and consequently effect a notable simplification and improvement of the rules of the conflict of laws.

### § 5. General Observations and Exceptions.

Emphasis has been placed in the present article on the failure of English courts to find, by the use of the *renvoi*, solutions which are of practical utility or intrinsic merit. It is not intended to repeat here what I have said on other occasions (*g*) with regard to the theoretical or logical aspects of the problem of the *renvoi*, but some general observations may be an appropriate sequel to the account already given of some of the practical difficulties encountered by English courts.

The misunderstandings which have been a striking feature of the attempts made by courts in the twentieth century to apply the doctrine of the *renvoi*, naturally suggest the celebra-

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(*f*) See chapter 8, § 6, note (*g*). As there noted, the reasoning of the judgment in *Bremer v. Freeman* (1857), 10 Moore P.C. 306, is so obscure that the case has been cited sometimes for the *renvoi* and sometimes against it. The result of the judgment of the Supreme Court of Canada in *Ross v. Ross* (1894), 25 Can. S.C.R. 307, may be justified on the special ground that it related to the formalities of a will of movables: see note (*q*), *infra*. *Bartlett v. Bartlett*, [1925] A.C. 377, it is submitted, has no bearing on the doctrine of the *renvoi*: see note (*x*), *supra*. As to some other cases in the Privy Council, see chapters 10 and 16. Lorenzen, *The Qualification, Classification, or Characterization. Problem in the Conflict of Laws* (1941), 50 Yale L.J. 743, at p. 753, says: "Although a goodly number of decisions and dicta in England seem to accept *renvoi*, there is no clear-cut decision by a higher court which really establishes the doctrine in English law."

(*g*) See, especially, chapters 7 and 8, where references are given to many articles by various writers.

tion of the centenary of the case of *Collier v. Rivaz* (*h*), in which, exactly one hundred years ago, the doctrine had its origin in English conflict of laws. The decision in this case involved all the elements of confusion which have bemuddled the subject in subsequent cases. Firstly, Sir Herbert Jenner's famous formula, namely, that the English court should decide the case as if it were sitting in Belgium was analogous to the clearly erroneous theory stated by him in an earlier case (*i*), namely, that the court of the domicile has exclusive jurisdiction to adjudicate on the validity of a will of movables. Secondly, Jenner J. was led into confusion as to the concept and effect of domicile in English law by the fact that article 13 of the French Civil Code, then in force in Belgium, provided for an authorized domicile, but not for an unauthorized domicile acquired *animo et facto* (*j*). The same article caused confusion in subsequent English cases in which the *de cujus* was domiciled in France, but was repealed in France in 1927 (*k*). Thirdly, Jenner J. confused the issue by failing to distinguish between formalities of making of a will and intrinsic validity of a will or succession on intestacy. The only question before him being the validity in point of form of various testamentary instruments—a will and six codicils—he admitted them all to probate in England. Those which were made in local Belgian form, that is, in accordance with the domestic rules of the law of the country in which the testator was domiciled at the time of his death, were admitted without argument. Those which were made in English local form were admitted to probate in England as being made in accordance with the conflict rules of the *lex domicilii*. Obviously the learned judge did not decide that a reference to the law of the domicile means a reference exclusively to the conflict rules of that law, but decided merely that, facultatively or alternatively, a will of movables is formally valid if it complies with either the domestic rules or the conflict rules of the law of the domicile. Similarly, in *In re Lacroix* (*l*), under Lord Kingsdown's Act, which alternatively allows

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(*h*) (1841), 2 Curt. 855: see chapter 7, § 6(2) (a). The article reproduced in the present chapter was published in 1941.

(*i*) *De Bonneval v. De Bonneval* (1838), 1 Curt. 857. As to this confusion between *lex* and *forum*, see chapter 8, § 5, under the heading *The Foreign Court Theory*.

(*j*) Cf. chapter 7, § 6(2) (a).

(*k*) See obituary notice in chapter 7, § 5 and § 6(4) (d).

(*l*) (1877), 2 P.D. 94, Sir James Hannen.

a will of "personal estate" (*m*) to be made in the form required by the law of the place of making, it was held that a holograph codicil made in France, in accordance with the domestic rules of the law of the place of making, and a will and codicil made in France in English local form, in accordance with the conflict rules of the law of the place of making, were all entitled to be admitted to probate in England. Thus a reference by an English statutory conflict rule to the law of France, which itself was only one of three alternative statutory references, in addition to the alternative reference under the old law to the law of the domicile, was itself construed as permitting a choice between either one of two meanings of the law of the place of making. This extreme indulgence shown by English courts in the case of formalities of making of a will of movables, *ut res magis valeat quam pereat*, seems to me, notwithstanding the opinion to the contrary which I formerly expressed (*n*) to be justifiable (*o*). If a testamentary instrument admittedly expresses the latest desire of the testator, and is not intrinsically invalid, it would seem that it should be held to be formally valid if it complies with either the conflict rules or the domestic rules of the proper law or of

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(*m*) The incongruities introduced into English conflict of laws by reason of the fact that the British Parliament in 1861 inadvertently used the words "personal estate" when it meant "movables" have been frequently pointed out: *cf.* chapters 23, 24 and 25; see also Johnson, *Conflict of Laws*, vol. 3 (1937) 21, 24. For the purpose of the present chapter the point to be emphasized is that although the legislature made a mistake in including within the scope of the statute such interests in land as are classed in English law as personal property (which ought not to be governed by a different conflict rule from that which governs such interests in land as are classed in English law as real property, namely, the *lex rei sitae*), nevertheless, *as regards movables*, the legislature was right in sanctioning the principle that so far as formalities are concerned various alternatives should be allowed to a testator, so as to justify the upholding of various testamentary instruments made by the same testator, some made according to the forms required by one law, others made according to the forms required by another law.

(*n*) (1930), 46 L.Q. Rev. 483, [1932] 1 D.L.R. 20; but *cf.* 47 L.Q. Rev. 290, [1932] 1 D.L.R. 46. See now chapter 7, § 6(2) (a).

(*o*) It is approved by Griswold, *Renvoi Revisited* (1938), 51 Harv. L. Rev. 1165, at p. 1191. Hans Lewald, *Règles générales des Conflits de Lois* (Bâle, 1941) 60, concludes: "Je maintiens donc les conclusions auxquelles je suis parvenu dans mon cours de 1929 [La Théorie du Renvoi, Recueil de l'Académie de Droit International, vol. 29 (1929) 583 ff.] Le renvoi érigé en principe me paraît inadmissible, ce qui n'exclut nullement qu'on puisse le reconnaître comme expédient utile dans des situations spéciales." At pp. 60, 61, he expresses his approval of *Collier v. Rivaz* and *In re Lacroix*.

any of the proper laws indicated by the conflict rules of the forum (*p*). This construction of the conflict rules of the forum would support the result in *Ross v. Ross* (*q*) and *Frere v. Frere* (*r*). Incidentally, a similar doctrine might justifiably be applied so as to uphold a marriage in point of formalities, if it is celebrated in accordance with either the domestic rules or the conflict rules of the law of the place of celebration (*s*).

While the result reached in *Collier v. Rivaz* is justifiable in the special circumstances of the case, the language of the judgment has given rise to far-reaching misunderstanding in later cases. Owing to the fact that the testamentary instruments made in Belgian local form were not opposed, only those made in English local form were discussed in the reasons for judgment, and when Jenner J. said that the English court should decide the case as if it were a court sitting in Belgium, he appeared to be stating a general formula applicable to any and every reference by an English conflict rule to the law of a foreign country, and this formula became the basis of judgments in subsequent cases of a different kind. Whereas he was stating merely an alternative or facultative construction of an English conflict rule in order to uphold a will in point of form, judges in later cases applied his formula as a general rule, namely, that a reference to a foreign law means whatever a foreign court would decide in a similar case.

If the question before a court relates to the intrinsic validity of a will or to succession on intestacy, and a conflict rule of the forum refers the question to a given foreign law, the forum must choose between the domestic rules and the conflict rules of that law, if the application of the conflict rules would lead to a different result from the result reached by the application of the domestic rules. The forum must decide one way or the other whether the testator had or had not disposing power and whether therefore there is or is not a partial or total intestacy, and in case of intestacy, who are the successors. The conflict is between different policies expressed in two

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(*p*) Cf. chapter 23.

(*q*) (1894), 25 Can. S.C.R. 307; cf. chapter 8, § 6, note (n), and chapter 7, § 6(6).

(*r*) (1847) 5 Notes of Cases 593: notwithstanding *Mendelssohn-Bartholdy, Renvoi in Modern English Law* (1937) 67, "It is an unequivocal judgment based on the doctrine of *renvoi*, rank and undiluted."

(*s*) Cf. chapter 8, § 6, note (x).

different systems of law, not on the question whether a testator with sufficient disposing power has expressed his admitted testamentary desires in a particular form, but on the question whether, regardless of formalities, there are limitations on his power, by any form of will, to control the disposition of his "property" after his death, and, to the extent that he has not validly disposed of all his property, on the question what is the "will of the law" which defines the successors. The forum must necessarily choose between the two systems of law, one of which is to furnish the rules for answering these questions, applying either the domestic rules or following the conflict rules of the proper law, each to the exclusion of the other. In which way this choice should be made has of course been the subject of acute controversy, though, if some judges had not decided otherwise, it would seem clear that an English conflict rule saying that succession to movables is governed by the *lex domicilii* bears its natural meaning and is a statement of the policy of English law that the matter is to be governed by the domestic rules of the *lex domicilii*. My immediate point is, however, that in this kind of case a court cannot possibly do what Jenner J. did with regard to formalities, namely, apply both the domestic rules and the conflict rules of the foreign law in the same case, upholding some testamentary instruments under the domestic rules, and others under the conflict rules, of the foreign law. In Jenner J.'s judgment his formula was merely an alternative device for supporting a testamentary instrument in point of form, and his judgment afforded no real basis for the exclusive use of his formula.

There may be some kinds of questions which the forum must decide as a court of a foreign country would decide, as, for example, a question of title to land situated in a foreign country, whether the question arises on the death of the owner or by reason of a transaction *inter vivos*. There may also be other kinds of questions which it is desirable that the forum should decide as a court of a foreign country would decide, as, for example, a question of status, as distinguished from the consequences or incidents of status or as distinguished from capacity (*t*). There may of course be legitimate difference of opinion as to where the line should be drawn, but it is sub-

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(*t*) See chapter 8, § 6, notes (a), (b) and (c), and cross-references there given.

mitted that, as regards the intrinsic validity of wills of movables and succession to movables on intestacy, there is no reason why an English court should make the attempt to follow what any foreign court would do with regard to movables situated in a foreign country (*u*), and it is submitted that from a practical point of view the futility of such an attempt has been demonstrated by what English courts have done, as discussed in the present chapter.

In the case of a commercial contract it would seem obvious that the proper law selected in accordance with the conflict rules of the forum means the domestic rules of the proper law. The matter would indeed hardly be worth mentioning were it not for the dictum to the contrary contained in the judgment of the Privy Council in *Vita Food Products v. Unus Shipping Co.* (*v*)—a dictum occurring in relation to the proper law arbitrarily selected by the parties, a case in which it is almost inconceivable that when parties say that the contract is to be governed, for example, by English law, they mean some law to be selected by a court in accordance with the doctrine of the *renvoi* (*w*).

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(*u*) Cf. chapter 8, § 5, as to problems arising chiefly in the field of succession to movables.

(*v*) [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433.

(*w*) See chapter 16, § 2, and chapter 17.

## CHAPTER X.

### THE RENVOI AND THE PRIVY COUNCIL\*

The judgment of the Judicial Committee of the Privy Council in *Jaber Elias Kotia v. Katr Blint Jiryes Nahas* (a) suggests some observations on the Privy Council itself and on the principles of the conflict of laws as expounded by it.

Ibrahim Elias Kotia died intestate and childless on December 7, 1937, a national of, and domiciled and resident in, the Lebanese State. The question was who was entitled to succeed to certain "mulk land" (that is, land held in full ownership) situated in Palestine and belonging to the intestate at the time of his death. The Palestine Succession Ordinance, 1923, s. 4, provides, *inter alia*, that a civil court shall distribute successions according to the following rules:

(iii) Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the religious communities, the following rules shall apply: (a) mulk land and movables of the deceased shall be distributed in accordance with the national law of the deceased; (c) where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied; provided that, if the national law imports the law of the domicile and the latter provides no rules applicable to the person concerned, the law to be applied shall be his national law.

In the District Court of Jaffa it was proved that in the case of land situated outside of the Lebanon, the Lebanese courts would apply the law of the country in which the land is situated, that is, in the present case, the law of Palestine, and the evidence on this point was accepted as sufficient by the Supreme Court of Palestine and by the Privy Council. It was therefore held by the Supreme Court (reversing the judgment of the District Court) and by the Privy Council that the land was to be distributed in accordance with the law of Palestine, the deceased being a person who came within the terms of clause iii of s. 4 of the ordinance.

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\* This chapter reproduces a comment published (1941), 19 Canadian Bar Review 682-688, and includes some supplementary observations.

(a) [1941] A.C. 403.

The decision is obviously right in the result. The Palestine Succession Ordinance clearly provides that the reference by the conflict rule of Palestine to the national law of the deceased (Lebanese law) is to be construed as a reference to the *lex rei sitae* (the law of Palestine) if "the national law imports . . . the law of the situation of an immovable," and it was proved that the national law does so import. In other words, in Palestine there is in force by statute a particular theory of the *renvoi* which is of course binding on any court of Palestine and on the Privy Council when it hears an appeal from a court of Palestine, and the question how an English court would construe a reference to the national law of a deceased person, or to the law of his domicile, is immaterial, because English conflict rules are irrelevant to the extent that the law of Palestine has its own statutory rules. The particular theory of the *renvoi* expressed in the Palestine Succession Ordinance may be described as the theory of partial *renvoi*, that is, the theory which by statute prevails in Germany (*b*) and which, without the help of any statute, prevails in France (*c*). According to this theory, if a conflict rule of X refers to the law of Y, and the corresponding conflict rule of Y refers to the law of X, a court of X will accept the *renvoi* or reference back and will apply the domestic rules of the law of X. If we substitute Palestine for X, the Palestine Succession Ordinance seems to provide in clear terms for the application of the domestic rules of the law of Palestine (the *lex rei sitae*) by virtue of the reference back from the law of the Lebanon (the national law). Only in the case of a reference by the national law to the law of Palestine as the law of the domicile does the ordinance provide for a possible further reference back to the national law, and this special provision with regard to the law of the domicile makes it doubly clear that the reference by the national law to the law of Palestine as the law of the situation is to be construed as a reference to the domestic rules of the law of Palestine.

On the other hand, several decisions of single judges in England have expounded a theory of total *renvoi*, according to which an English court applies whatever domestic rules have been or would be applied by a court of the country to the law of which reference is made by the conflict rule of the forum.

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(b) *In re Askew*, [1930] 2 Ch. 259; see chapter 9, § 1, note (i).

(c) *In re Annesley*, [1926] Ch. 692; see chapter 9, § 1, note (h).

The result of this theory of total *renvoi* is that an English court gives effect to whatever theory of the *renvoi* prevails in the law of the particular foreign country in question. Thus, if an English conflict rule refers to the law of the foreign domicile of the *de cujus*, the court applies the domestic law of the domicile in the case of a *de cujus* domiciled in a country in which a theory of partial *renvoi* prevails, as, for example, France (*d*) or Germany (*e*), but applies the domestic law of England or of some other country in supposed compliance with the conflict rule of the domicile in the case of a *de cujus* domiciled in a country by the law of which the doctrine of the *renvoi* is rejected, as, for example, in Italy (*f*).

It would be out of place in the present comment for me to point out again (*g*) the theoretical and practical objections which seem to be applicable to the English theory of the total *renvoi* or the elements of confusion which occur in the series of judgments of single judges in which that theory has been expounded; but, whatever may be said in defence or in criticism of the English theory of total *renvoi*, it is plain that that theory is fundamentally different from the theory of partial *renvoi* which prevails in France, Germany and Palestine.

The distinction just stated seems to have escaped the attention of Clauson L.J., in delivering the judgment of the Privy Council in the *Kotia* case, because, in aid of his construction of a conflict rule stated in plain terms in the Palestine Succession Ordinance, he states his view of the way in which an English court would construe a reference by an English conflict rule to the law of a foreign country. There would seem to be two objections to the mode of reasoning of the learned lord justice. Firstly, it is not helpful, in construing a special statutory conflict rule of Palestine which provides for the acceptance of a reference back, to attempt to support a particular construction of that rule by an *obiter dictum* as to what an English court would do in the case of a reference to the law of a foreign country under an English conflict rule. Secondly, the *obiter dictum* as to what an English court would do is erroneous, because it appears on the face of the English decisions that an

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(*d*) *In re Annesley*, *supra*.

(*e*) *In re Askew*, *supra*.

(*f*) *In re Ross*, [1930] 1 Ch. 377; *In re O'Keefe*, [1940] Ch. 124; see chapter 9, § 1, note (*g*).

(*g*) *Cf.* chapters 8 and 9.

English court sometimes accepts the reference back and sometimes does not, after considering what particular theory of the *renvoi* prevails in the foreign law (*h*).

Furthermore it would appear that Clauson L.J. has allowed himself to slip into the error of imagining that the Privy Council is an English court, whereas in the case under discussion it was merely a Palestine court sitting in England. It tends to impair one's confidence in the Privy Council as an appellate tribunal if that tribunal seems to forget that its duty is to decide a case as if it were sitting in the country from which the appeal comes, or if its reasons for judgment seem to suggest that it is sitting as an English court, and deciding a case from an English point of view. Particularly, in the conflict of laws it is important that a case be decided from the point of view of the forum, and it leads to confusion if the Privy Council on an appeal from a court in Palestine, that is, from a forum in which English law is a foreign law, seems to transfer the forum to England, with the necessary consequence that English law becomes the *lex fori* and the law of Palestine becomes a foreign law (*i*). For the purpose of further discussion of this point the following passage from the judgment of the Privy Council delivered by Clauson L.J. deserves quotation:

In the English courts, phrases which refer to the national law of a *propositus* are *prima facie* to be construed, not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the *propositus*, having regard to what, in their view, is his domicile (if they consider that to be relevant), and having regard to the situation of the property in question (if they consider that to be relevant).

It is difficult to assign any intelligible meaning to the foregoing passage unless we suppose that Clauson L.J. imagines the Privy Council to be an English court engaged in the task of construing a conflict rule of a foreign law. So far as I know there is no English conflict rule referring to the national law of a person, and the cases cited by Clauson L.J. do not

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(*h*) Contrast *In re Ross* with *In re Annesley* and *In re Askew*, all cited above.

(*i*) A similar confusion of *fora* seems to vitiate some of the reasoning of Lord Wright, on an appeal from Nova Scotia, in *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433; see chapter 16, and the supplementary remarks in the present chapter; cf. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 458, 459.

mention any such English conflict rule. It has of course sometimes happened that an English court has discussed a foreign conflict rule referring to the national law of a person, but only as a foreign rule proved as a matter of fact in an English court, differing from case to case according to the evidence given in the English court. It is hard to imagine how an English court can have any general theory as to the meaning of a reference to the national law in a foreign conflict rule, in the absence of evidence in a particular case, or what bearing the English court's theory can have upon the construction by a Palestine court of a conflict rule of the law of Palestine.

One unfortunate result of the practice of the Privy Council of delegating to one member the statement of the reasons for judgment is that the single judgment delivered is sometimes of a pontifical character, and the reasons given for the judgment and the *obiter dicta* are sometimes so general as to be misleading, even though the effect of the judgment may be right (j). It is of course incredible that there are not sometimes dissenting opinions in the Privy Council, or even if the members are agreed as regards the disposition of the appeal, that the judgment delivered by one member represents exactly the reasons which the other members might give if they were permitted to express their reasons for publication. In particular, it would seem to be clear that *obiter dicta* contained in the single judgment delivered would probably not have been expressed in the same form in the judgments of all the members if they had individually given their reasons, and it is submitted that such *obiter dicta* should be treated as expressing the views merely of the member by whom the "judgment of their Lordships was delivered," and not as expressing the considered opinion of all the members. If it were well understood and always borne in mind that *obiter dicta* occurring in a judgment

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(j) One example that occurs to me is the judgment in *MacKenzie v. Royal Bank of Canada*, [1934] A.C. 468, in which the Privy Council, in the generality of its statement as to the effect of innocent misrepresentation, completely ignores the distinction drawn in *Kennedy v. Panama, New Zealand, etc., Royal Mail Co.* (1867), L.R. 2 Q.B. 580, between misrepresentation which is material in the sense that it induces consent and misrepresentation which is material in the sense that it is fundamental with regard to the subject matter, notwithstanding that in the House of Lords in *Bell v. Lever Brothers*, [1932] A.C. 161, the *Kennedy* case had been cited with approval, by two members of the majority and by one member of the minority. The judgment of the Privy Council may be justified in the result on the ground that the misrepresentation in question was fundamental.

of the Privy Council express merely the opinion of an individual member, this would alleviate *pro tanto* the legitimate grievance that appeals from countries outside of the United Kingdom are less satisfactorily dealt with than appeals from within the United Kingdom. On an appeal from an English court to the House of Lords, the differences of opinion of the members of the appellate court are not concealed as they are in the case of the Privy Council. Consequently, the *obiter dicta* of the individual members of the House of Lords are less likely to be harmful than are those of the Privy Council. A comparison of the different reasons for judgment in the House of Lords affords a means of estimating the value of the *obiter dicta* of an individual member. The *obiter dicta* in the House of Lords are more likely to be carefully expressed and to be supported by adequate discussion, than the cryptic utterances of the Privy Council.

The subject of the conflict of laws is still in the formative stage. The problems arising are especially complicated and cannot be satisfactorily solved without adequate discussion. It is therefore especially undesirable that the Privy Council should in this field of law make categorical pronouncements on matters of general principle without disclosing in the reasons for judgment that the various possible applications of the alleged general principle have been considered or even that the tribunal is aware of the difficulties inherent in the alleged principle (*k*).

A judgment of the Privy Council may be disregarded in the Court of Appeal in England (*l*), and even in a divisional court of the High Court of Justice in England a judgment of the Privy Council "ought of course to be treated . . . as entitled to very great weight indeed" or is "to be treated with the utmost respect," but is not a binding authority, and need not be followed (*m*). *A fortiori* the *obiter dicta* of the Privy Council may be disregarded in an English appellate court. A country from which appeals still lie to the Privy Council is in a less fortunate position. Unless we accept as accurate the *obiter dictum* of Middleton J.A., delivering the judgment in

(*k*) Both the case which is the subject of the present comment and the *Vita Food* case, *supra*, are examples of the attempt of the Privy Council to dispose summarily by way of *obiter dicta* of important general principles of the conflict of laws.

(*l*) *Fanton v. Denville*, [1932] 2 K.B. 309, at p. 332, Greer L.J.

(*m*) *Dulieu v. White & Sons*, [1901] 2 K.B. 669, at p. 677, Kennedy J., and p. 683, Phillimore J.: cf. *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141, at pp. 154, 161, C.A.

the Court of Appeal for Ontario in *Negro v. Pietro's Bread Co.* (n) that "the binding effect of the judgment of the Privy Council is limited to the courts of the colony from which the appeal is had," any Canadian court is bound by a judgment of the Privy Council delivered on an appeal from say Palestine or India (o). In practice, even the *obiter dicta* of the Privy Council are, in Canada, apt to be regarded as being almost sacrosanct, and it has therefore seemed worthwhile to give some examples tending to show that these *obiter dicta*, so far from being accepted offhand at their face value, should be rather carefully examined (p).

### SUPPLEMENTARY OBSERVATIONS

This seems to be an appropriate place for some further remarks on the confusion that results if the Privy Council, when it hears an appeal from a country other than England, is thought of as an English court instead of a court of the country from which the appeal comes. If that country has a composite system of personal law, and in the particular circumstances that system refers to English law, English law is merely a special rule of the domestic law of the forum, and is not referred to by virtue of any conflict rule of the law of the forum, and the doctrine of the *renvoi* is not involved (q). Furthermore, from another point of view, it is immaterial whether the country from which the appeal comes has a composite system of personal law or has a system of territorial law. Even if there is a reference to English law by virtue of a conflict rule of the law of the forum, and the Privy Council consequently holds that English law is applicable, the case is not an example of the *renvoi*. Thus, in *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.* (r) the Privy Council heard an appeal from Her Britannic Majesty's Court for Zanzibar, and in *Bartlett v. Bartlett* (s) the Privy Council

(n) [1933] O.R. 112, at pp. 117-19, [1933] 1 D.L.R. 490, at pp. 494-6.

(o) Cf. *Robins v. National Trust Co.*, [1927] A.C. 515, at p. 519, [1927] 2 D.L.R. 97, at p. 100, [1927] 1 W.W.R. 692, at p. 696.

(p) In chapter 26 will be found some examples of cases in which the Privy Council, in deciding questions as to the incidence of taxing statutes, has made some statements which are misleading, if not wholly erroneous, as to the conflict of laws.

(q) See chapter 9, § 3, note (x).

(r) [1901] A.C. 373.

(s) [1925] A.C. 377; see chapter 9, § 3, note (x).

heard an appeal from His Britannic Majesty's Supreme Court for Egypt. In each case the Privy Council was bound to apply the law of the forum, that is, in one case the law of Zanzibar, in the other the law of Egypt. That law would of course be the whole law of the forum, including its conflict rules, and the Privy Council had to decide each case as if it were sitting in the country from which the appeal came. Whether it applied the domestic law or the conflict rules of that country would make no difference for the purpose of the present discussion. In other words, the case would not be an example of the *renvoi* unless the Privy Council, on being referred by a conflict rule of the law of the forum to, let us say, English law, then considered whether by English conflict rules there was a reference back to the law of the forum or forward to some other law. On the other hand, in *Bremer v. Freeman* (t) the Privy Council heard an appeal from the Prerogative Court of Canterbury. The Privy Council was an English court and was referred by a conflict rule of the law of the forum, English law, to the law of France, and it is only the obscurity of the judgment which prevents the case from being an unequivocal authority on the *renvoi*. If, as is possible though doubtful, the Privy Council applied French conflict rules, not domestic French law, the case would be an example of the *renvoi*.

If the Privy Council hears an appeal from a British dominion or colony, although it happens to sit in England, it is not, as already submitted, an English court, and it should not decide the case from an English point of view as if the law of the forum were the law of England. It is not suggested that the Privy Council usually or frequently makes the mistake of imagining itself to be an English court. The mistake is made more often by nonjudicial authors when they cite cases such as the *Charlesworth* case and the *Bartlett* case as examples of the *renvoi*. Occasionally, however, even the Privy Council itself has discussed a question of the conflict of laws from the point of view of English law and not from the point of view of the law of the forum (u). A similar situation might arise in an appeal to the House of Lords from a Scottish court, but in that event it is improbable that the House of Lords, although it happens to sit in England, would imagine itself to

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(t) (1857), 10 Moore P.C. 306; see chapter 7, § 6(2) (b).

(u) See note (i), *supra*.

be an English court expounding English law, instead of a Scottish court expounding the law of the forum, that is, Scottish law.

## CHAPTER XI.

### INTERNATIONAL AND INTRANATIONAL CASES.

- § 1. Country (law district) and national unit, p. 223.
- § 2. Conflicts of laws within the United States, p. 227.
- § 3. Conflicts of laws within the British Empire, p. 234.

#### § 1. Country (Law District) and National Unit.

It is of course necessary in the conflict of laws to distinguish between (1) a territorial unit in the sense of the whole of the territory which is subject to one sovereign and (2) a territorial unit which is subject under one sovereign to a body or system of law peculiar to it. In Dicey's nomenclature the former is a "state" and the latter is a "country" or "law district" (*a*). Story, consistently with the adjective "international" in the title *Private International Law*, commonly used "nation" in the second sense, although occasionally he said "state" or "country". This use of "nation" has ceased to be common in English, and in the *Restatement of the Conflict of Laws* "nation" is used in the first sense and "state" in the second. This use of "state" is of course natural in the United States of America, because a state of the United States is a territorial unit in the second sense, as is a state of the Commonwealth of Australia. Elsewhere, however, this use of "state" in the conflict of laws is less natural, and either "country" or "law district" seems preferable.

For the purposes of the present discussion a case may *provisionally* be called an "international" case if it involves a conflict between the laws of two countries or law districts which are subject to different sovereigns, and a case may *provisionally* be called an "intranational" case if it involves a conflict between the laws of two countries or law districts which are subject to one sovereign. As will appear later, however, some of the cases falling technically within the second class of cases may have to be treated as if they were "international" cases.

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(*a*) See chapter 1.

A "nation", in the Restatement sense of a "politically sovereign unit," or a "state" in Dicey's nomenclature, may be unitary or composite (*b*). That is to say, an independent national unit may consist of, or be coextensive with, a single law district, or it may comprise two or more law districts. A relatively simple example of a composite national unit is the United States of America, including within the national territory a large number of law districts. The British Empire (*c*) is a more complicated example of a composite national unit, it being composite to the second degree inasmuch as some of its component parts are themselves composite. Some of those component parts may be mentioned by way of illustration (*d*). The United Kingdom includes two law districts, England and Northern Ireland, which are common law countries, and Scotland, which has a distinctive system of law. Canada is a federal union consisting of the province of Quebec and eight common law provinces, and includes the Yukon Territory and the Northwest Territories, each of these units being (except for some purposes which are negligible in the present discussion) a separate law district. Australia is also a federal union consisting of six common law "states", and includes certain territories, each of these units being (except for some purposes which are negligible in the present discussion) a separate law district. By contrast Newfoundland and New Zealand, and many other units of the British Empire are separate law districts, and regarded individually are "unitary" in the sense in which the word is used in this chapter, although they are parts of the composite Empire.

The topic of nationality within the British Empire is itself complicated enough to require some explanation, including, firstly, a statement of the relevant legislation as of the year 1946, and, secondly, a statement of the effect of the Canadian Citizenship Act, enacted in 1946 by the Parliament of Canada, subject to a provision that it is to come into force on a date to

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(*b*) Cf. chapter 9, § 3.

(*c*) I use this expression rather than British Commonwealth of Nations, because the latter expression may be used in the narrower sense of the group consisting of the United Kingdom and the self-governing Dominions.

(*d*) For an account of many of the law districts of the British Empire, with particular reference to those included within the Dominion of Canada and the Commonwealth of Australia, see Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938) 7 ff.

be fixed by proclamation of the Governor in Council. By proclamation of July 1, 1946, the date fixed for the coming into force of the statute is the first day of January, 1947.

Apart from the Canadian Citizenship Act the situation is as follows. By virtue of parallel and substantially uniform legislation enacted in the United Kingdom, Canada, Newfoundland, Australia, New Zealand and South Africa (*e*) and in or for other units of the British Empire, British nationality is Empire-wide, and a person who is a natural-born British subject, or an alien naturalized in one unit, has the status of a British subject in other units. There is, for example, no such thing as the status of English or Canadian subject, citizen or national in any sense that is material for the purposes of the conflict of laws, although in Canada the Immigration Act (*f*) defines a "Canadian citizen" for the purposes of that statute, and the Canadian Nationals Act (*g*) defines a "Canadian national" for the purposes of the League of Nations (*h*). It follows that a case involving a conflict between the laws of any two law districts within the British Empire is, at least technically, an "intranational" case, but may have some of the usual characteristics of an "international" case in that the conflict might be one between two substantially different systems of law. A lawyer in Ontario, if he has access to an adequate library, might ascertain fairly well the law of another common law province, the law of England or Ireland, the law of New South Wales or New Zealand, or even for that matter the law of New York or Pennsylvania, but he would have more difficulty with the law of Scotland, or with the French law of Quebec or Mauritius or the Roman-Dutch law of a South African province, and the conflict rules as well as the domestic rules of the laws of any of these law districts might differ from those of the law of Ontario. Presumably, a lawyer in New York might have a similar difficulty in forming his own opinion on a point of Louisiana law.

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(*e*) The prototype is the British Nationality and Status of Aliens Act, 1914, enacted by the Parliament of the United Kingdom. The corresponding Canadian statute is the Naturalization Act, R.S.C. 1927, c. 138 (originally enacted in 1914, repealed in 1919, but revived in 1920), as amended by the Statutes of Canada, 1931, c. 39 (as regards the nationality of a married woman).

(*f*) R.S.C. 1927, c. 93.

(*g*) R.S.C. 1927, c. 21, originally enacted in 1921.

(*h*) See Debates of the House of Commons of Canada, 1921, pp. 397, 585, 644, 767, 2031, 2151.

A brief statement of the main features of the Canadian Citizenship Act will be sufficient for the present purpose. The Naturalization Act (*i*) and the Canadian Nationals Act (*j*) are repealed (s. 45). Nationality in Canada is defined in terms of Canadian citizenship instead of British nationality. Provision is made for "natural-born" Canadian citizens (s. 9), and for the granting of a certificate of Canadian citizenship (instead of a certificate of naturalization as a British subject as the former legislation provided) to any person who is not a Canadian citizen and who complies with the requirements of the statute as to lawful admission to Canada and residence therein and other matters (s. 10). The status of British subject, Empire-wide, is, however, continued. A Canadian citizen is a British subject (s. 26). A person "who has acquired the status of British subject by birth or naturalization under the laws of any country of the British Commonwealth (*k*) other than Canada to which he was subject at the time of his birth or naturalization, shall be recognized in Canada as a British subject" (s. 28).

As regards the conflict of laws the new Canadian legislation makes little or no change. Whereas in English conflict of laws, or in the conflict of laws of a province of Canada, or generally speaking of any Anglo-American country, there is no conflict rule referring any question to the national law of any person, it is a common feature of many systems of the conflict of laws in countries of continental Europe and elsewhere that a conflict rule refers a question to the national law of a given person. This leads to difficulty if that person is a British subject, because there is no British private law, but merely English, Scottish, Ontario or Quebec private law, or as the case may be, and therefore the reference does not indicate the law of a particular law district. If the person in question is or was domiciled in some particular law district of the British Empire at the material time, the reference to his national law

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(i) See note (e), *supra*.

(j) See note (f), *supra*.

(k) The expression British Commonwealth is not defined in the statute, but it is provided (s. 39) that the Governor in Council may authorize the issue of a proclamation declaring that any part of His Majesty's dominions not listed in the first schedule to the statute is a country of the British Commonwealth for the purposes of the statute. The countries listed in the schedule are the United Kingdom, Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, Ireland and Newfoundland.

might be construed as a reference to the law of that law district, but if he is or was domiciled at the material time in some law district outside of the British Empire, the reference to his national law would be meaningless (1). Superficially, if the person to whose national law reference is made is a Canadian citizen, within the meaning of the Canadian Citizenship Act, the reference is simplified, but it may still remain ineffective for the purpose of the conflict of laws, because Canada is itself a composite unit consisting of a group of law districts, and if a person was or is domiciled outside of Canada at the material time, the reference to his national law would be meaningless.

## § 2. Conflicts of Laws Within the United States.

The next subject for consideration is the suggestions that have sometimes been made that cases involving conflicts between the laws of two law districts which are parts of a single national unit—especially if they are members of a federal union—should be treated differently from cases involving conflicts between the laws of two countries which are, or are parts of, different national units.

Cheatham, Dowling, Goodrich and Griswold (a) say:

Conflict of laws cases touching two or more national states or nations will be called international conflicts; those involving non-national states within the same nation, intra-national or interstate conflicts.

A question of growing importance is whether this difference is decisive, that is, whether the rules of Conflict of Laws will depend on whether the case is an interstate or international one. No single answer can be given, for the other state concerned in an international conflicts case (say, a Minnesota-Manitoba or Maine-New Brunswick case) may be one of the Canadian provinces with social, economic, and political ideas similar to our own or it may be an Asiatic kingdom with wholly different institutions.

Neuner (b), under the heading "co-operation between different states," finds that a system of conflict of laws cannot be based in the international field upon a duty imposed upon a state by international law, but adds:

The situation among the states of a federal union is different. Membership in such a union implies the duty not to ignore the legal systems of the other members of the union *in the field of private law*. Within these broad limits different solutions are possible; it may be

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(1) See chapter 9, § 4.

(a) Cases and Materials on Conflict of Laws (2nd ed. 1941) 3.

(b) Policy Considerations in the Conflict of Laws (1942), 20 Can. Bar Rev. 479, at p. 481.

that only outrageous disregard of the legal system of a sister state will be restrained or that a definite system of conflict of laws is imposed.

Griswold (c) suggests the special treatment of problems of conflict of laws between two states of the United States. This suggestion is made with specific reference to Cheshire's contention that the attempt to apply foreign conflict rules, including foreign theories of the *renvoi*, leads to great uncertainties (d). This is what Griswold says:

Two partial answers may be made to this contention. The reference to what the foreign court will do may not lead to any question of *renvoi* in the foreign law; and these problems do not always lead us to the Continent. These questions can and frequently do arise among states of the United States. A reason which might be of some weight in a case where Continental law has to be applied ought not to be generalized into an absolute rule against any recognition of foreign conflicts rules in any circumstances whatever (e).

That there is some substance in both of Griswold's "partial answers" may be at once admitted. It is his second answer that is relevant to the subject of the present chapter. It should be noted, however, that when he subsequently states the "thesis" of his article (f), he does not limit it to cases arising between states of the United States, or between Anglo-American countries. Even where the forum is referred to the law of a country of continental Europe, his "thesis" seems to be that the reference should, as a matter of course, be to the "whole law" of the foreign country, with the view of deciding the case as it would be decided by a court of that country, except in the "few cases which will not lend themselves to this approach." My purpose is not to advance any argument against Griswold's thesis. In fact he and I are probably not far apart in the result in our views about the *renvoi*, though I should prefer to say that the *renvoi* is a useful device in limited classes of cases in which uniformity of decision is peculiarly important (provided that uniformity is practically attainable

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(c) *Renvoi Revisited* (1938), 51 Harv. L. Rev. 1165, at p. 1179.

(d) Cheshire, *Private International Law* (2nd ed. 1938) 62, 65.

(e) The author adds in a footnote: Compare the argument that conflict of laws rules in situations involving states of the United States, or other Anglo-American jurisdictions, may well be different from the rules applicable where the reference is to a foreign or non-common law country. This is best developed in Du Bois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions* (1933), 17 Minn. L. Rev. 361.

(f) 51 Harv. L. Rev. 1165, at p. 1182, with cross-reference to the fourth method of approach, stated at pp. 1168, 1169.

by the ascertainment of what a foreign court would do in the particular case), and that in other cases, on both theoretical and practical grounds, the *renvoi* should be disregarded (*g*).

Cook, in two different chapters of his book (*h*), suggests the special treatment of cases of conflicts between the laws of two states of the United States.

In the course of his discussion of the doctrine of the *renvoi* as applied to succession to movables (*i*), it being assumed that the purpose of the rule that the succession is governed by the law of the domicile of the decedent is to secure uniformity of distribution, and that the forum is in a state of the United States, he points out some of the difficulties that may present themselves if the decedent was domiciled in a "foreign country." If the decedent was domiciled, however, in another state of the United States, the attempt of the forum to secure uniformity of distribution by ascertaining how the movables would be distributed in the other American state and by adopting the same mode of distribution, would be more likely to succeed, and Cook adds in a footnote: "If the other state concerned were England, or some other state following generally adopted notions of Anglo-American law (e.g., a Canadian province), it may be that similar considerations would lead to the same conclusion, namely, that attainment of uniformity of distribution is reasonably possible."

Again, in the case of an action brought in one state in respect of a tort alleged to have been committed in another state, Cook says (*j*) that "if forum and place of wrong are two American states, there seems to be every reason . . . why the rule as to burden of proof should be characterized by the forum as part of the 'substantive law' of the place of wrong." This seems to be a reasonable device for giving a fuller effect to the law of the place of wrong under the rule widely prevailing in the United States that tort liability is governed by the law of the place of wrong (*k*). The suggestion made by

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(*g*) See chapter 9, § 5; *cf.* Cook, Logical and Legal Bases of the Conflict of Laws (1942) 237, 241-243.

(*h*) Logical and Legal Bases of the Conflict of Laws (1942), chapter 8 (Characterization) and chapter 9 (*Renvoi*).

(*i*) *Op. cit.* (1942) 244, 245.

(*j*) *Op. cit.* (1942) 223.

(*k*) The rule is of course inapplicable in England and in the provinces of Canada, where the doctrine of *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, prevails. See chapter 2, § 1(3), and chapter 45.

Cook in the passage quoted above raises some interesting questions discussed elsewhere, as to what he means in a passage occurring in an earlier chapter of his book (1).

Consistently with the suggested differentiation between conflict of laws problems arising within the United States and those arising between a state of the United States and a foreign country, I venture to reproduce here a conjecture of my own (m) concerning what is perhaps the most mystifying feature of the Conflict of Laws Restatement of the American Law Institute. As between different states of the United States the acquired rights theory (n) may be said to be based upon the existence of a common theory with regard to jurisdiction to create rights. Between those states there may be supposed to exist a substantial identity of conflict rules, so that problems of the *renvoi* or problems arising from conflicts of characterization are so infrequent as to be negligible. The acquired rights theory is in these circumstances only a disguised mode of stating the scope and meaning of the supposedly common body of conflict rules, and is therefore relatively unimportant. If a question of the conflict of laws arises, however, between a state of the United States and a foreign country, there may be no common theory of jurisdiction to create rights, or no common theory as to choice of law or characterization, and the problem of the *renvoi* is more likely to arise. In these circumstances the forum in a state of the United States must do, what it does not ordinarily have to do in a case involving two states of the United States, that is, it must define its attitude with regard to the relation between the conflict rules of the forum and the conflict rules of the foreign country. On the face of the Conflict of Laws Restatement there is, however, no suggestion of the special treatment of cases arising between two states of the United States, and there is an obvious contradiction (o) between the theory of acquired rights, or of jurisdiction to create rights, stated in various sections of the Restatement on the one hand, and the rejection of the doctrine of the *renvoi* as a general rule and the insistence on characterization by the *lex fori*, stated in § 7 of the same Restatement,

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(1) *Op. cit.*, p. 21. See chapter 2, § 2(2), *supra*, p. 31.

(m) Originally published (1939), 17 Can. Bar Rev. at pp. 387, 388.

(n) As to which, see chapter 2, § 1.

(o) Cf. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 330 ff., 374, 375.

on the other hand. Possibly we must think of most of the Restatement as an exposition of a system of the conflict of laws limited in its application to the states of the United States, within which there is supposed to exist a substantial identity of doctrine with regard to jurisdiction to create rights and with regard to characterization, so that there is no need to provide for cases of conflict of conflict rules. And possibly we must think of § 7 of the Restatement as containing special provisions applicable as between a state of the United States and a foreign country, that is, to cases in which there is more likely to be a conflict of conflict rules, the effect being to maintain the supremacy of the conflict rules of the forum by expressly negating the doctrine of the *renvoi* and providing for characterization by the *lex fori*, and of course impliedly negating the acquired rights theory. Whether or not this conjecture is right in the sense that it affords a possible explanation or alleviation of the mutually inconsistent theories of the Restatement, it seems strange that no serious attempt has been made to reconcile the theories.

The suggestion made in various forms in some of the passages quoted above that cases of the conflict of laws arising between states of the United States should be treated in a special way (*p*) is of course especially important by reason of the existing diversity of both domestic and conflict rules of law within the United States, resulting, as regards domestic rules, from *Erie Railroad Co. v. Tompkins* (*q*), and, as regards conflict rules, from *Klaxon Co. v. Stentor Electric Mfg. Co.* (*r*) and *Griffin v. McCoach* (*s*). Cook's disapproving discussion of the *Klaxon* and *Griffin* cases (*t*) includes a penetrating analysis of certain judgments of Holmes J. and Brandeis J., leading to the conclusion that their objections to the extension of the principle of *Swift v. Tyson* (*u*) were probably

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(*p*) The question whether a similar suggestion is appropriate or practicable in cases arising between the provinces of Canada, or between law districts within the British Empire, will be discussed in § 3 of the present chapter, *infra*.

(*q*) (1938), 304 U.S. 64.

(*r*) (1941), 313 U.S. 487.

(*s*) (1941), 313 U.S. 498.

(*t*) Logical and Legal Bases of the Conflict of Laws (1942) 109, at pp. 112 ff., 126 ff.; *cf.* Wolkin, Conflict of Laws in the Federal Courts (1946), 94 U. of Penn. L. Rev. 293.

(*u*) (1842), 16 Pet. 1, overruled by *Erie Railroad Co. v. Tompkins. supra*.

not intended to apply to the field of the conflict of laws. In *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation* (v) the Supreme Court of the United States held that in an issue involving a federal, not a state, question, it is unnecessary to consider whether the doctrine of the *Klaxon* case (requiring a federal district court to follow the conflict of laws rules of the state in which it sits) is applicable where the federal jurisdiction is not based on diversity of citizenship.

The foregoing discussion of the suggested special treatment of conflict problems arising within the United States suggests in turn a particular feature of American conflict of laws, namely, that, somewhat paradoxically, most of the conflict cases which engage the attention of American courts are in fact cases which rise between states of the United States, and that it is in this field that American writers, with some notable exceptions, have done their most intensive and valuable work. It is quite understandable that in the circumstances there may have been a tendency to develop in the United States a system of the conflict of laws which is perhaps peculiarly suitable for these intranational cases but less suitable for use in international cases. Fortunately there is no need that American conflict doctrine should be described by me as "isolationist," because this has been done in vigorous terms by Yntema in his contribution to the Foreword to Rabel's *Treatise on the Conflict of Laws*, appearing in the series of Michigan Legal Studies published by the University of Michigan Press and edited by Yntema (w).

The charge of isolationism is of course not one which may be made only against American conflict of laws. Isolationism is also a characteristic to a greater or less extent of other systems of the conflict of laws, but the nature and the degree of isolationism vary from country to country. In continental Europe there exists a multitude of distinct and conflicting national systems of the conflict of laws, but conflict problems of an international character arise so frequently that it is impossible for specialists in the subject in one country to ignore the conflict rules of other

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(v) (1942), 315 U.S. 447, at pp. 455, 456: cf. pp. 465 ff. See also *Clearfield Trust Co. v. United States* (1943), 318 U.S. 363; comment (1943), 43 Columbia L. Rev. 520; and a note (1946), 59 Harv. L. Rev. 966, on Exceptions to *Erie v. Tompkins*: the Survival of Federal Common Law.

(w) Rabel, *The Conflict of Laws: a Comparative Study*, vol. 1 (Introduction; Family Law), 1945. The same adjective "isolationist" is used by William Draper Lewis, Director of the American Law Institute, in his part of the Foreword to Rabel's book.

countries, and it is from a practical point of view necessary that some means of accommodation be found between conflicting systems of the conflict of laws. In England many of the cases presenting conflict problems happen to bear a superficially cosmopolitan aspect because they so frequently arise from situations connected with countries of continental Europe, or with other countries the laws of which differ widely and sometimes fundamentally from English law; and in Canada conflict problems not infrequently arise from the differences between the law of a common law province and the law of Quebec. Nevertheless English and Canadian conflict of laws could not fairly be described as anything but isolationist. Yntema refers, *inter alia*, to the "positive Anglicanism" of Dicey.

In the United States, as Yntema points out (*x*), the current isolationism of conflict of laws doctrine has been accentuated by certain contributing factors: (1) by a quite natural preoccupation on the part of specialists in the subject with the relatively frequent conflicts of jurisdiction and law within the United States, and (2) by the extensive influence of the theories expounded by Beale (*y*), including the belief that reference in the field of the conflict of laws to civil law authorities is not one that tends "to preserve the correctness and purity of the common law,"—"conceit," says Yntema, "strange and for the United States unexpedient." In consequence of these influences inadequate attention has been given in the United States to the relation between American conflict rules and those of foreign countries other than England. Having explained the circumstances in which the Conflict of Laws Restatement was prepared, Yntema concludes:

Hence the failure in this monumental codification of the Common Law to take account of other systems was not merely an effect of, but has become a cause to perpetuate, an inappropriate view of international private law, which no longer befits the United States. On this count alone and apart from other limitations duly noted by critics, we repeat, the Restatement needs to be restated. But the preceding observations will suggest that it is still more important to provide the indispensable basis for such revision, including the

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(*x*) Rabel, *op. cit.*, p. xvi.

(*y*) Beale and the Conflict of Laws Restatement are for the present purpose indistinguishable: cf. pp. 10, 11, *supra*, and the articles cited in note (*t*) on p. 40, *supra*. See also, especially, Yntema, The Restatement of the Law of Conflict of Laws (1936), 36 Columbia L. Rev. 183, for criticism of the Restatement in point of form and an account of the reasons why the Restatement fails, in point of substance, to serve either its original purpose or any other useful purpose.

comparative information without which inbred doctrines remain unquestioned and their objective, scientific consideration in terms of international needs is excluded *a limine*.

To supply this need for information in the comparative law of the conflict of laws, the University of Michigan took over from the American Law Institute the services of Rabel and has provided funds and facilities for the preparation by him of a comprehensive treatise, of which, at the time of the printing of the present book, only the first volume has appeared.

### § 3. Conflict of Laws Within the British Empire.

The question now to be discussed is whether there is a useful analogy between cases of conflicts within the United States and cases of conflicts within the British Empire, or within the Dominion of Canada, or, in other words, whether the suggestion as to the special treatment of cases within the United States, may be extended to cases in which the conflict of laws arises between British law districts or at least between common law districts within the British Empire. That a useful analogy may exist has been stated somewhat casually by some writers in the United States, as already noted, but the question requires somewhat more detailed consideration.

One reservation may be stated at once. If an action is brought in one state of the United States in respect of an alleged tort committed in another state of the United States, it may well be that the conflict rules of the law of the forum should be so construed and applied as to reach the result, so far as practicable, that the case will be decided in the same way as it would be decided if the action were brought in the state in which the alleged tort was committed. The case presents no useful analogy, however, to an action brought in a province of Canada in respect of an alleged tort committed in another province of Canada, or to an action brought in any law district within the British Empire in respect of an alleged tort committed in any other law district within or outside of the British Empire, because the court would be bound by the formula stated in *Phillips v. Eyre* (a). The effect of that formula would appear to be (b) that the cause of action is wholly governed by the domestic rules of the law of the forum applied to a hypothetical domestic situation, subject

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(a) (1870), L.R. 6 Q.B. 1.

(b) See chapter 2, § 1(3), and chapter 45.

only to the proviso that the act must not have been justifiable by the law of the place where the act was done applied to the actual situation. The result is that in the field of tort law there is little or no room left for any special degree of co-operation in cases of the conflict of laws between two law districts within the British Empire, and I return to the general question in other fields of law.

With the exceptions, negligible for the present purpose, of the Exchequer Court of Canada (c) and the Admiralty Court, every court of first instance in Canada is a provincial court (there being nothing corresponding with the distinction between federal courts and state courts which exists in the United States). From this provincial court there may be appeals to a provincial court of appeal, to the Supreme Court of Canada and to the Privy Council, subject to limitations not material for the present purpose. On any such appeal the appellate court must of course apply the law of the forum, that is, the law of the province in which the action is brought, including the domestic rules and the conflict rules of that law (d).

The domestic rules of the law of one common law province may of course differ from those of the law of another common law province by reason of divergent statutes of the provinces enacted within their legislative power, but, subject to such provincial legislation, there is a single system of English common law, the uniformity of which is preserved by appeals to the Supreme Court of Canada, in the exercise of its general appellate jurisdiction, not limited to "federal" questions (e), or to the Privy Council, or by decisions of the House of Lords (f). Consequently there is nothing in Canada comparable with the diversity of state laws resulting in the United States from diverse decisions of state courts, and, by virtue of *Erie Railroad*

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(c) Claims against the Crown authorized to be brought in that court may involve questions of the conflict of laws.

(d) Occasionally the Privy Council has overlooked this point: see chapter 10.

(e) Cf. Reed, Training for the Public Profession of the Law (Bulletin No. 15 of the Carnegie Foundation for the Advancement of Teaching, 1921) 33, and Present-Day Law Schools in the United States and Canada (Bulletin No. 21 of the same Foundation, 1928) 324, 325.

(f) See *Robins v. National Trust Co.*, [1927] A.C. 515, [1927] 2 D.L.R. 97, [1927] 1 W.W.R. 692: the relevant passage is quoted towards the end of chapter 26.

*Co. v. Tompkins (g)*, prevailing to some extent even in federal courts.

On the other hand there is in Canada no body of law comparable with the general common law applied by federal courts, such as existed in the United States under the overruled doctrine of *Swift v. Tyson (h)*, although there is of course a body of law enacted by the Parliament of Canada within its exclusive legislative power under the British North America Act, 1867, and this body of law is part of the law of every province. Even that body of law may have a background of provincial law with local variations giving rise to entirely distinct questions of legislative power and questions of the conflict of laws. For example, the Bills of Exchange Act enacted by the Parliament of Canada is in force in every province, and the power of that Parliament would doubtless extend to further legislation either within the limits of the law of bills and notes in the strict sense or as being ancillary or necessarily incidental to legislation in relation to bills and notes, and in this connection arises the difficult question as to the scope of s. 10 of the statute, which makes applicable to bills, notes and cheques the "rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act" (*i*). Distinct from the questions of legislative power just mentioned, there may be questions of the conflict of laws arising from diversity of provincial law in transactions in which bills or notes play a part.

Turning now from the domestic rules of the laws of the provinces of Canada to the conflict rules of those laws, we find again that the situation presents a striking contrast with that which prevails in the United States. If we postpone consideration of the province of Quebec, the conflict rules of the law of each of the other provinces, the common law provinces, are English conflict rules, subject to any provincial statute embodying a departure from English conflict rules. Any attempt on the part of a provincial court to establish a rule of the conflict of laws peculiar to one province is destined in the

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(g) (1938), 304 U.S. 64: cf. § 2 of the present chapter, *supra*, note (q).

(h) (1842), 16 Pet. 1: cf. § 2 of the present chapter, *supra*, note (u).

(i) The subject of the whole sentence in the text is discussed by me in some detail in *The Bills of Exchange Act in Quebec (1942)*, 20 Can. Bar Rev. 723; *The Disorder of the Statutes of Limitation (1943)*, 21 Can. Bar Rev. 786, at pp. 800 ff.

long run to be futile because it may be overruled by a decision of the Supreme Court of Canada, or of the Privy Council, or of the House of Lords. It follows that as between two provinces of Canada there cannot be a conflict of conflict rules, except by virtue of a provincial statute, which might of course depart from English conflict rules in the discretion of a provincial legislature within its legislative powers. There cannot therefore be a situation comparable with the situation resulting from *Klaxon v. Stentor Electric Mfg. Co.* (j) in the United States. As to the possibility that divergent rules of the conflict of laws might be established in the provinces by statutes of the provinces, the only significant statutory departure from English conflict rules that occurs to me consists in divergent provincial versions of Lord Kingsdown's Act (k). Generally speaking, it is difficult to see how the problem of the *renvoi* or any comparable problem can arise between two common law provinces by reason of a conflict of conflict rules. If the problem of the *renvoi* should arise between two common law provinces, we might have a case that has not yet occurred in which the very identity of the conflict rules of two countries produces an *impasse* (l). For example, the theory of total *renvoi*, that is, that a court in X which is directed by a conflict rule of the law of X to apply the law of Y should decide the case in the same way as it would be decided by a court in Y, depends in England at present on certain decisions of single judges (m). If this theory is ever established by the decision of an appellate court, and is held to be in force in the provinces of Canada, then we might have the situation in which a court in X province must decide a case in the same way as the very case would be decided by a court in Y province, and the only information the court in X could get as to what a court in Y would do would be that a court in Y would decide the case in the same way as it would be decided by a court in X.

If a question of the conflict of laws arises between one of the common law provinces of Canada, say Ontario, and the province of Quebec, the case would be only technically an intranational case, as already defined, and would really, as a

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(j) (1941), 313 U.S. 487: cf. note (r) in § 2 of the present chapter, *supra*.

(k) See chapter 23.

(l) Cf. chapter 9, § 1, note (e), and § 2, note (q).

(m) Cf. chapter 8, § 6, note (g), and chapter 9, note (f) at the end of § 4.

general rule, have the characteristics of an international case. Not only are the domestic rules of the law of Quebec substantially different from those of a common law province, but the conflict rules of the law of Quebec differ on many points from those of the law of a common law province (*n*), notwithstanding the efforts of the Privy Council and the Supreme Court of Canada to assimilate the conflict rules of Quebec and the English conflict rules prevailing in the other provinces. For example, the primary rule in Quebec with regard to the formal validity of wills is that the governing law is the law of the place of making, but the Supreme Court has construed this rule as being facultative, not imperative, so that alternatively a will of movables is formally valid if it complies with the law of the last domicile of the testator (*o*). Again the Privy Council has held that the rule that the formal validity of a marriage is governed by the law of the place of celebration is in force in Quebec, and, as in English conflict of laws, is imperative, not facultative, so that a marriage celebrated in accordance with the formalities of the law of the domicile of the parties is invalid if it is not celebrated in the form prescribed by the law of the place of making (*p*). Again, as we have already seen, the Supreme Court has held that in an action brought in Quebec in respect of an alleged wrong committed elsewhere, the English doctrine of *Phillips v. Eyre* (*q*) is in force in Quebec (*r*).

A case of the conflict of laws arising between a common law province such as Ontario and the province of Quebec, although it is technically an intranational case is substantially an international case, and especially in the field of family law bears

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(*n*) See Johnson, *Conflict of Laws With Special Reference to the Law of the Province of Quebec*, vol. 1 (1933), vol. 2 (1934), vol. 3 (1937).

(*o*) *Ross v. Ross* (1894), 25 Can. S.C.R. 307, reversing, on this point, the judgment of the Court of Queen's Bench for Quebec (Q.R. 2 Q.B. 413), but affirming that judgment in the result by the application of the doctrine of the *renvoi*. The result is, it is submitted, justifiable on the ground that as regards the formal validity of a will of movables it is desirable the will should be held to be valid, *ut res magis valeat quam pereat*, if it complies with either the conflict rules or the domestic rules of the proper law: see chapter 8, § 6, and chapter 9, § 5.

(*p*) *Berthiaume v. Dastous*, [1930] A.C. 79, [1930] 1 D.L.R. 849, reversing the judgment of the Court of King's Bench for Quebec (Q.R. 45 K.B. 391).

(*q*) (1870), L.R. 6 Q.B. 1.

(*r*) See chapter 2, § 1(3), and chapter 45.

a striking resemblance to a case arising between England and France. By way of further example may be mentioned the situation arising between England and France in *Ogden v. Ogden* (s), fully discussed elsewhere (t), and its counterpart between Ontario and Quebec (u).

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(s) [1908] P. 46.

(t) See chapter 4, § 1, and chapter 40, § 11.

(u) Cf. *McClure v. Holford*, [1946] *Revue Légale* 126, comment (1946), 24 *Can. Bar Rev.* 219.

## CHAPTER XII.

### LIMITATION OF ACTIONS AND PRESCRIPTION\*

- § 1. Characterization of domestic statute, p. 240.
- § 2. Characterization of foreign statute, p. 243.
- § 3. Suggested modes of solution, p. 249.
- § 4. Tolling provisions of domestic statute, p. 252.

In English law, and in Anglo-American law generally, judicial discussion of limitation of actions in the conflict of laws usually resolves itself into a problem of characterization, involving the distinction between substance and procedure. This distinction is material because of the rule that a court applies the domestic procedural rules of the law of the forum, without regard to the proper law of the cause of action selected in accordance with the conflict rules of the law of the forum.

The "law of the forum" includes of course the conflict rules as well as the domestic rules of that law. Sometimes, however, when the context shows that a narrower meaning is intended, the law of the forum may be used in the sense of the domestic rules of that law, and, in the case of statutes of limitation, it is convenient to use the expressions "foreign statute" and "domestic statute" (or "statute of the forum") in the sense of the domestic rules of a foreign law and the domestic rules of the law of the forum respectively, excluding in each case any conflict rules of the foreign law and of the law of the forum.

#### § 1. Characterization of Domestic Statute.

Sometimes an English statute has been held in England to be procedural merely because it is expressed in the form "no action shall be brought," but it is submitted that this mode of

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\*This chapter reproduces § 2 of an article, entitled *The Disorder of the Statutes of Limitation*, published (1943), 21 *Canadian Bar Review* 669-683, 786-809. Section 2, under the heading *Limitations in the Conflict of Laws* appeared at pp. 786-800. For convenience the present chapter has been subdivided into sections.

expression is not in itself sufficient ground for characterizing a statute as procedural in the conflict of laws (a). In connection with statutes of limitation, however, the common English test is expressed in the form that a statute which extinguishes the "right" is substantive, whereas a statute which merely bars the "remedy" is procedural. If the title to land or a chattel is in question, Anglo-American courts have generally been willing to recognize the extinguishing effect of a statute of limitation of the foreign situs of the thing, in accordance with the general rule that the property in things is determined by the *lex rei sitae* (b); but in cases relating to personal obligations and not involving the title to a tangible thing, the courts have been, it is submitted, too much inclined to characterize a statute of limitation of the forum as being procedural, so as to be applicable to an action even upon a foreign cause of action without regard to any foreign statute (c).

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(a) For discussion of the general principle, see chapter 13; cf. chapter 4, § 4 (Statute of Frauds), and chapter 14, § 5(c) (Gaming Acts).

(b) See Westlake, *Private International Law*, § 171, citing *Beckford v. Wade* (1805), 17 Ves. 87; *In re Peat's Trusts* (1869), L.R. 7 Eq. 302; *Pitt v. Lord Dacre* (1876), 3 Ch. D. 295; contrast Westlake, *op. cit.*, §§ 238, 239, with regard to obligations. In England the standard example of a statute which extinguishes the "right and title" of the owner of land after the expiration of the statutory period has long been the Real Property Limitation Act, 1833, s. 34 (now superseded in England by the Limitation Act, 1939, s. 16). As to chattels, Cheshire, *Private International Law* (2nd ed. 1938) 640, cites *Shelby v. Guy* (1826), 11 Wheaton (24 U.S.) 361 (the title to a slave acquired by possession under the law of Virginia and recognized as valid by the law of Tennessee). In England, under s. 3 of the Limitation Act, 1939, the title of the owner of a chattel is extinguished after the expiration of the period prescribed for bringing an action for conversion or wrongful detention of the chattel. See also review of English and American cases in Ailes, *Limitation of Actions and the Conflict of Laws* (1933), 31 Michigan L. Rev. 474, at pp. 486 ff. In view of *Pugh v. Heath* (1882), 7 App. Cas. 235, 16 R.C. 389, an action for foreclosure under a mortgage of land must be regarded as an action which involves the title to the land, and therefore it falls within the extinguishing provision of the Real Property Limitation Act. It is doubtful whether a court should ever entertain an action for foreclosure in respect of land situated in another country; see chapter 30, § 4. If such an action is entertained at all, it would seem that effect must be given to an extinguishing provision of the *lex rei sitae*. On the other hand in *Colonial Investment and Loan Co. v. Martin*, [1928] S.C.R. 440, [1928] 3 D.L.R. 784, it was held that an action in Manitoba on a covenant for payment in a mortgage of land situated in Saskatchewan was barred by the Manitoba Real Property Limitation Act.

(c) The following are well known examples, in English courts and in the House of Lords. In *British Linen Co. v. Drummond* (1830)

What I have called for convenience the "English test" for distinguishing between "substance" and "procedure" in connection with limitation of actions, on the basis of the distinction between a statute which extinguishes the "right" and a statute which merely bars the "remedy", does not always lead to satisfactory results as will appear in the subsequent discussion (chiefly relating to contract cases). It may also be observed generally that "right" and "remedy" are ambiguous and misleading terms. A "right" is not something which has an objective existence independently of a "remedy"; it should not be reified or regarded as a "thing" which can be acquired in one country and then carried to another country and there enforced; it exists in a particular country only if it can be predicted that the courts and officials of that country will enforce it or give a remedy for its breach, so that a person may have a right in one country and no right or a different right in another country. In some situations a court may give a remedy so as to create a right similar to or identical with a right which a particular party has in a foreign country. An Anglo-American court, however, when referred by a conflict rule of the law of the forum to the law of a foreign country, usually consults the domestic rules of the foreign law, ignoring or impliedly rejecting the doctrine of the *renvoi*, and only in exceptional cases (probably not including contract and tort

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10 B. & C. 903, it was alleged by the plaintiff that the cause of action which arose in Scotland had not yet been barred in Scotland when the action was brought in England, but the English statute of limitation was applied. In *Alliance Bank of Simla v. Carey* (1880), 5 C.P.D. 429, an action was brought in England upon a promise under seal made in India. Action was barred in India by a statute providing for a limitation of three years applicable to contracts whether under seal or not. It was held that the action in England was not barred, as less than twenty years had elapsed since default in payment. In *Don v. Lippmann* (1837), 4 Cl. & Fin. 1, 5 R.C. 930, an action was brought in Scotland upon a bill of exchange drawn, accepted and payable in France, a judgment having already been obtained by the plaintiff in France without personal notice to the defendant. The action was held by the House of Lords to be barred by the statute of limitation of the forum—the Bills of Exchange Act, 1772 (Scotland). As to this statute, see Gloag & Henderson, Introduction to the Law of Scotland (3rd ed. 1939) 149, 150. See also the cases cited in note (k) in § 4 of the present chapter, *infra*. On the other hand, contrary to the conclusions reached in the present chapter. Ailes, *op. cit.* (note (b), *supra*), at p. 502, after a valuable review of many cases in various countries, reaches the conclusion that the Anglo-American rule applying the statute of limitation of the forum has the merit of simplicity and convenience and that there are no substantial considerations of justice or policy militating against the rule.

cases) consults the conflict rules of the foreign law so as to ascertain exactly what right a party has in the foreign country in the particular circumstances. To what extent a court will or should have recourse to foreign rules of law is a matter of policy of the law of the forum (*d*). Again, the word "remedy" may include much more than "procedure", and "procedure" itself may have different meanings for different purposes (*e*).

## § 2. Characterization of Foreign Statute.

If a court holds that an action in England upon a foreign cause of action is barred by an English statute, because the statute is characterized as procedural, obviously the court does not have to concern itself with the characterization of any foreign statute which might conceivably be applicable on the theory that it is substantive and has had the effect of extinguishing the cause of action (*f*). Occasionally, however, it may happen that an action upon a foreign cause of action is not barred by the statute of limitation of the forum (as, for example, by reason of a tolling or saving clause in the statute, or because the cause of action has been revived or renewed by part payment or acknowledgment in writing, or simply because the statutory period has not run, or conceivably because the statute of the forum is characterized as substantive and therefore inapplicable to the foreign cause of action), and it may then become necessary for the court to characterize the corresponding statute of limitation or prescription of the proper law of the cause of action. An English court in such a case would probably apply to the foreign statute the English test, originally invented with regard to English statutes, that is, the distinction between a statute which extinguishes the "right" and a statute which merely bars the "remedy", without con-

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(*d*) See Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 19 ff., 29 ff., 36 ff., elaborating, *inter alia*, Holmes J.'s definition of a right as the "hypostasis of a prophecy," as against the same judge's statement of the *obligatio* theory. See discussion in chapter 2, § 2(2) (3).

(*e*) See the discussion of substance and procedure in chapter 13.

(*f*) For a similar point, see *Leroux v. Brown* (1852) 12 C.B. 801, in which the action was dismissed on the ground of non-compliance with the English Statute of Frauds, characterized as procedural, and it was therefore unnecessary for the court to characterize article 1341 of the French Civil Code, which probably relates to formalities of contract, not evidence or procedure, and therefore rendered the contract void by French law. See chapter 4, § 4.

sidering whether the English test is appropriate to the characterization of a foreign statute as being substantive or procedural, as the case may be. The result might be unsatisfactory if by the English test the foreign statute is characterized in England as procedural, and therefore is held to be inapplicable to an action in England, although by the foreign law it is regarded as substantive; and conceivably in some circumstances it might be held that neither the foreign statute nor the English statute is applicable, the former because it is procedural, the latter because it is substantive, or that both statutes are applicable, the former because it is substantive and the latter because it is procedural. "Unsatisfactory" is indeed too mild a description of some of these hypothetical results (g).

The case of *Huber v. Steiner* (h) is of particular interest, and has been the subject of a good deal of discussion. Action was brought on a promissory note, dated May 12, 1813, made by the defendant "at Mulhausen, which was at that time subject to the law of France, where both the plaintiff and the defendant may be taken to have been then domiciled." The note was payable to the plaintiff on May 10, 1817. "In the course of 1813, very shortly after the making of the note, and nearly four years before it became due, both parties quitted Mulhausen; the plaintiff going to Switzerland, the defendant to England, where he has ever since resided and been domiciled." In an action in England brought more than six years after the due date of the note, the defendant pleaded both the English statute of limitation and article 189 of the French Commercial Code. The plea of the English statute was successfully met by the plaintiff's replication that he was beyond the seas from the time of the accrual of the cause of action, so that there remained only the defence of the French law of prescription. Article 189 of the *Code de Commerce* is quoted in the original French in the report of the argument and may be translated as follows:

All actions relating to bills of exchange, and to promissory notes subscribed by merchants, traders, or bankers, or for commercial purposes, are prescribed (*se prescrivent*) by five years, counting from the day of protest, or the last judicial proceeding, if there has been no judgment, or if the debt has not been recognized by separate writing (*acte séparé*). Nevertheless the debtors will be

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(g) As to the fallacy underlying the reasoning by which some of these results might be reached, see the discussion towards the end of § 2, *infra*.

(h) (1835), 2 Bing. N.C. 202.

bound, if required, to declare under oath that they are no longer indebted, and their widows, heirs, or successors, that they believe in good faith that nothing is owing.

The defendant argued that the plaintiff's cause of action was extinguished by French law, and therefore no action would lie upon it in England. The court held, however, that even granting that this might be so if the parties had continued to reside in France during the whole of the period of prescription, the principle would not apply to the present case; and that in any event, in view of the exception as to acknowledgment in writing and the right of the creditor to put the debtor and his successors upon their oath, article 189 did not have the effect of extinguishing the cause of action, but merely barred the remedy, and therefore was inapplicable to an action in England (*i*).

It will be observed that in the case of bills and notes in commercial matters article 189 of the French Commercial Code, held or assumed in *Huber v. Steiner* to be the relevant provision of French law, does not expressly extinguish the cause of action, whereas in certain cases falling within the French Civil Code express provision is made as to extinguishment by article 1234 of that code (*j*). In Quebec, on the other hand, prescription of bills and notes is dealt with in article 2260 of the Civil Code of Lower Canada, and it is provided by article 2267 that in the cases mentioned in articles 2250, 2260, 2261 and 2262 "the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

In Quebec, at least for domestic purposes, effect is given to the extinguishment clause of article 2267 (*k*), and presumably, if the question arose in a conflict case in Québec the group of articles to which article 2267 refers would be characterized as

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(*i*) Cf. *Williams v. Jones* (1811), 13 East 439, at p. 450, characterizing a statute as procedural on the ground that the right is not extinguished if the remedy may be revived by a subsequent promise. This case will be further mentioned in § 4, note (*k*), in connection with the question of tolling provisions suspending the operation of statutes of limitation by reason of the absence of the defendant.

(*j*) Article 1234 was mentioned in the argument, but not in the judgment, in *Huber v. Steiner*.

(*k*) *Catellier v. Bélanger*, [1924] S.C.R. 436, [1924] 4 D.L.R. 267. This was an action upon a promissory note in a purely domestic situation arising in Quebec, involving articles 2260 and 2267. There was no question of the conflict of laws, but, from the point of view of legislative power, I have discussed the case further in *The Disorder of the Statutes of Limitation* (1943), 21 Can. Bar Rev. at p. 805.

substantive. The question perhaps could not arise in Quebec in view of the conflict provisions of articles 2290 and 2291 hereinafter quoted (*l*), and as Johnson (*m*) remarks, article 2267 does "not deal with conflicts."

On the other hand, if the same article 2267 is in question in a court of another country, a common law country, a prescription provision of the Civil Code of Lower Canada might, notwithstanding article 2267, be characterized as procedural in view of other articles of the code recognizing interruption of prescription or revival of the debt by acknowledgment on the part of the debtor. For example, in *Canadian Pacific Ry. Co. v. Johnston* (*n*) there are dicta to this effect. *Huber v. Steiner* (*o*) was cited by the court as supporting the view that the Quebec statute might be characterized as merely barring the remedy. In the later case of *Wood & Selick v. Compagnie Générale Transatlantique* (*p*), a United States Circuit Court of Appeals, while refraining from wholly approving the reasons for judgment in the *Johnston* case, discussed *Huber v. Steiner*, and considered it as supporting the view that article 433 of the French Commercial Code (*q*) does not extinguish the cause of action, but merely bars the remedy. The "libels were filed for damage to certain consignments of goods, shipped on the respondent's vessels under bills of lading, issued in France," and containing a provision for resort to French law and adjudication by a French commercial tribunal. Under article

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(*l*) *Infra*, at end of the present chapter.

(*m*) Conflict of Laws with Special Reference to the Law of the Province of Quebec, vol. 2 (1934) 457.

(*n*) (1894), 61 Fed. 738, 25 L.R.A. 470, Lorenzen, Cases and Materials on the Conflict of Laws (5th ed. 1946) 378. This was a case in a United States Circuit Court of Appeals, on appeal from the circuit court for Vermont, in an action brought by the respondent against the appellant for damages for injuries sustained in Quebec, involving articles 2262 and 2267 of the Civil Code of Lower Canada. The court speaks of the "law of Canada" and the "code of Canada," without specific reference to Quebec, but the reasoning is not affected by this misapprehension.

(*o*) *Supra*, note (*h*).

(*p*) (1930), 43 Fed. (2nd) 941, Harper & Taintor, Cases and Other Materials on Judicial Technique in Conflict of Laws (1937) 282, at pp. 285, 286-287 (passages reprinted on these pages also appear in Lorenzen, *op. cit.*, p. 381) with particular reference to *Huber v. Steiner*.

(*q*) Which like article 189, in question in *Huber v. Steiner*, contains no express provision for extinguishment of the cause of action. Article 434 provides for interruption of prescription by acknowledgment in writing.

433 of the French Commercial Code the period of prescription is one year, and the appellants contended that the claims were extinguished, as a result of reading this article along with article 1234 of the Civil Code, which expressly provides for extinguishment. Apparently without questioning the propriety of resorting to the Civil Code in a case governed by the Commercial Code, the court held that prescription under article 1234 itself, read in the light of other provisions of the Civil Code (*r*), should be treated as more nearly analogous to a statute "barring the remedy" than to one "extinguishing," or "a condition upon," the right. *Huber v. Steiner* was considered to be an authority in favour of the view that article 1234 of the Civil Code "went only to the remedy," whereas it would seem that the provision really in question in *Huber v. Steiner* was article 189 of the Commercial Code.

Beckett (*s*) reviews the leading English cases relating to statutes of limitation in the conflict of laws, rightly distinguishing between characterization of an English statute and characterization of a foreign statute. He thinks that great weight should be attached to the foreign characterization of a foreign rule of law, but that this is not conclusive for an English court, and that the English court, on the basis of its information as to the foreign characterization, should then characterize the foreign rule "according to the conceptions of analytical jurisprudence, a branch of legal science which is in essence purely general and theoretical, and not national (*t*)—and which on another page he describes as "that general science of law, based on the results of the study of comparative law" (*u*).

Cheshire (*v*), after reviewing the leading English cases, then, with particular reference to the case of *Huber v. Steiner* (*w*), in which an English court characterized an article of the French

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(*r*) Under article 2220 the debtor may renounce the benefit of prescription after it is complete, and under article 2223 the court can give effect to prescription only if the debtor claims the benefit of it. In Quebec, compare articles 2184 and 2188 of the Civil Code of Lower Canada.

(*s*) The Question of Classification ("Qualification") in Private International Law (1934), 15 Brit. Y.B. Int. Law 66-69, 75-77.

(*t*) *Op. cit.*, pp. 72, 73.

(*u*) *Op. cit.*, p. 59.

(*v*) Private International Law (2nd ed. 1938) 642, citing Beckett, *op. cit.*, pp. 67-68, 75.

(*w*) *Supra*, notes (*h*), (*o*).

Commercial Code as procedural because, according to the English test, it did not extinguish the "right" but merely barred the "remedy," says that "the French view was disregarded, for French law is unacquainted with the English test, though it holds on quite different grounds that the particular article in question concerns substance, not procedure." According to Cheshire (*x*) the decision was wrong because the matter is one of secondary characterization governed solely by the proper law of the cause of action. Robertson, who, like Cheshire considers the matter to be one of secondary characterization governed by the *lex causae* (*y*), dissents from the opinion of Beckett and Cheshire that the so-called English test for distinguishing between substance and procedure in connection with limitation of actions is unknown or not used in France and Germany (*z*).

Beckett's theory of characterization in accordance with analytical jurisprudence and comparative law is of course attractive in its attempt to attain a universal standard of characterization, but would seem to be impracticable (*a*). The Cheshire-Robertson theory of secondary characterization of a foreign statute in accordance with the *lex causae* seems to apply inflexible logic without regard to the possible consequences of characterizing the foreign statute and the domestic statute by different standards, and it is submitted that what is needed is a more flexible theory of characterization by the forum and final selection of the proper law after examination of the potentially applicable laws (*b*). The Cheshire-Robertson theory might lead, in the case of statutes of limitation, to the conclusion that neither the foreign statute nor the domestic statute is applicable, or that both statutes are applicable (*c*). The fallacy inherent in the supposedly logical process advocated by Cheshire and Robertson has been pointed out by Cook (*d*). If a cause of action originates in Y under the law of Y, an action in Y would

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(*x*) *Op. cit.*, pp. 42, 43.

(*y*) Characterization in the Conflict of Laws (1940) 64, 65.

(*z*) *Op. cit.*, pp. 248-250, citing as to Germany Schoch, Klagbarkeit, Prozessanspruch und Beweis in Licht des Internationalen Rechts (1934), and as to France the same author.

(*a*) *Cf.* chapter 3, § 2.

(*b*) *Cf.* chapter 6, and chapter 8, § 7.

(*c*) *Cf.* note (*g*), *supra*.

(*d*) The Logical and Legal Bases of the Conflict of Laws (1942) 219 ff., 224.

be a purely domestic case and a court in Y would of course apply the domestic statute of limitations without regard to its being characterized as substantive or procedural. If the action is brought in X, and it is alleged that the statute of Y is characterized in Y as procedural, obviously the characterization of the statute of Y for domestic purposes is immaterial to its characterization for conflict of laws purposes, and the characterization of the statute in Y for conflict purposes is equally immaterial to a case which from the point of view of Y is a purely domestic case.

### § 3. Suggested Modes of Solution.

Obviously a process of reasoning which may lead to the conclusion that both the foreign statute and the domestic statute of the law of the forum are applicable, or that neither statute is applicable, is not satisfactory (*e*). The forum should, it is submitted, characterize both the foreign statute and the domestic statute for the purpose of determining which of them is applicable *within the meaning of the conflict rule of the law of the forum relating to limitation of actions*. In an action upon a foreign cause of action the forum should compare the two statutes and if it comes to the conclusion that, notwithstanding differences of wording, the two statutes are intended to perform essentially the same function, it should decide which of the two statutes is subsumed under the conflict rule of the forum (*f*).

As already noted, the usual Anglo-American conflict rule is that a domestic statute of limitation relating to personal actions is characterized as procedural and is therefore applicable even to a foreign cause of action, and that the corresponding foreign statute may or may not be characterized by the forum as procedural, according to the same test which has led the forum to its characterization of the domestic statute as procedural.

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(*e*) Cf. the similar problems in connection with the Statute of Frauds and analogous statutes, discussed in chapter 4, § 4.

(*f*) Cf. Nussbaum, *Principles of Private International Law* (1943) 83, 84, and the same author's review of Robertson, *Characterization in the Conflict of Laws* (1940), 40 *Columbia L. Rev.* 1464, 1465. On the other hand, see Rabel, *Conflict of Laws*, vol. 1 (1945) 63-67, under the heading *Extent of the Reference*, specifically criticizing *Huber v. Steiner* (*supra*, pp. 244, 245) and rejecting the theory of secondary characterization. According to Rabel, without resort to comparative law, a satisfactory solution can be found in the application of the foreign law "in its totality."

The result may or may not be satisfactory in particular circumstances, and the conflict rule should, it is submitted, be reconsidered and restated with the view of reaching a satisfactory result in every kind of case.

One alternative is for an Anglo-American court to adhere to the rule that the domestic statute is characterized as procedural, and then, if the corresponding foreign statute performs an essentially similar function, characterize it as procedural within the meaning of the conflict rule of the forum, without regard to the way in which it is characterized in the foreign country or the way in which it might be characterized according to the test used in the characterization of the domestic statute. Thus, in an action upon a foreign cause of action only the domestic statute would be material. The result would be satisfactory to the extent that one, and only one, of the two statutes would be applicable, but the question whether it is wholly satisfactory to apply the domestic statute of the forum to a foreign cause of action is doubtful.

Another alternative is for an Anglo-American court to reconsider the foundation of the usual conflict rule based on the characterization of statutes of limitation as procedural, and adopt the rule generally prevalent in continental Europe that a statute of limitation or prescription is substantive, and that the statute of the proper law of the cause of action is applicable (*g*).

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(*g*) Cf. E. G. Lorenzen, *The Statute of Limitations and the Conflict of Laws* (1919), 28 Yale L.J. 492, at pp. 495-497. To the contrary, see Ailes, *op. cit.* (*supra*, notes (a) and (b) in § 1 of the present chapter), approving of the existing Anglo-American rule. Hancock, *Torts in the Conflict of Laws* (1942) 133-140, concludes his discussion of statutes of limitation with a general reference to Lorenzen's note and the article by Ailes, and to a note in (1931) 71 U. of Penn. L. Rev. 1112. He stresses the distinction between a situation in which the foreign limitation period is shorter, and a situation in which it is longer, than the corresponding domestic limitation period, and suggests different treatment of these two situations. His discussion, which relates chiefly to tort cases, presupposes the doctrine prevalent in the United States that tort liability is determined by the law of the "place of wrong" and therefore is, to some extent at least, inapplicable in a forum in which the doctrine of *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, prevails: see chapter 45. He omits any cross-reference to the characterization (qualification, classification) problem, although on pp. 66, 69, 72, 73, 76, he has already mentioned statutes of limitation in connection with that problem. The distinction above mentioned might be a useful device to prevent injustice in some cases, if none of the solutions suggested later in the text should be found to be practicable. In the discussion in § 4 of the present chapter I refer to the same distinction.

Either alternative might be too difficult for an Anglo-American court, but, as noted below, in the converse case the problem did not prove too difficult for a German court, and in British Columbia and in some states of the United States statutes have been passed making applicable, to some extent, foreign statutes of limitation to foreign causes of action.

Some German cases (*h*) are good examples of difficulties arising from diverse characterizations of statutes of limitation. An action was brought in Germany upon a Tennessee promissory note, after the German period of limitation (3 years) and before the Tennessee period (6 years) had expired. It was held in 1882 that neither statute applied, the German statute because it was substantive by German law, and the Tennessee statute because it was procedural by Tennessee law. The decision, says Nussbaum, was "obviously unsound," and in later cases (in 1910 and 1934) concerning English promissory notes German courts "reached a better result." The courts found that the limitation of actions, though differently characterized in German law and English law, is practically the same in effect, despite minor differences, and therefore the English statute of limitation is a limitation within the meaning of the German conflict rule and "under the German theory, as going to substantive law." Consequently the German courts applied the English statute.

The normal result of the strong tendency of Anglo-American courts to characterize foreign as well as domestic statutes of limitation as procedural is to deprive the defendant of the benefit of the foreign statute in an action upon a foreign cause of action. Courts have sometimes succeeded in avoiding this result by what Holmes J. calls "a reasonable distinction" and "have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. The same conclusion would be reached if the limitation were in a different statute, pro-

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(*h*) See Nussbaum, *op. cit.* (note (f), *supra*); cf. Beckett, *op. cit.* (note (s), *supra*) 67, criticizing the decision of 1882, and advocating the solution in fact adopted in the decision of 1910.

vided it was directed to the newly created right so specifically as to warrant saying that it qualified the right" (i).

#### § 4. Tolling Provisions of Domestic Statute.

Again, in another class of cases, the exclusive application of the domestic statute of limitation to a foreign cause of action may operate unfairly against the defendant, namely, if he is not only deprived of the benefit of the foreign statute, but also, by reason of a tolling provision of the domestic statute, is deprived of the benefit of that statute. The prototypes of tolling provisions in statutes of limitation are the saving clauses of 21 James I, c. 16, s. 7, and 4 & 5 Anne, c. 3 (or c. 16), s. 19, the former preserving the right of the plaintiff, if he was beyond the seas when his cause of action accrued, to bring an action within the statutory period after his return, and the latter preserving the right of the plaintiff to bring an action within the statutory period after the defendant's return in the case of the latter being beyond the seas when the cause of action accrued. Provisions of the latter type still appear in some Anglo-American statutes, but provisions of both types have been repealed in England (j).

*Williams v. Jones* (k) is an old and typical case under the former English law. The statutes of James and Anne were

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(i) Holmes J. in *Davis v. Mills* (1904), 194 U.S. 451, Cheatham, Dowling, Goodrich and Griswold, *Cases and Materials on Conflict of Laws* (2nd ed. 1941) 555. The learned judge's fondness for his own much criticized *obligatio* theory—cf. Cook, *op. cit.* (note (d), *supra*) 34 ff.—leads him to state the Anglo-American treatment of statutes of limitation as a qualification [modification] of that theory. Other cases on the point stated in the text are to be found in Lorenzen, *op. cit.* (note (n), *supra*) 394 ff.; cf. Goodrich, *Conflict of Laws* (2nd ed. 1938) 203, 204; Stumberg, *Conflict of Laws* (1937) 143, 145.

(j) Limitation Act, 1939; Preston & Newsom, *Limitation of Actions* (1940) 314. The provision relating to the plaintiff's absence had been repealed in England by the Mercantile Law Amendment Act, 1856.

(k) (1811), 13 East 439; cf. note (i), in § 1. This case illustrates the provision relating to the defendant's absence. The provision relating to the plaintiff's absence is illustrated by *Lafond v. Ruddock* (1853), 13 C.B. 813, at pp. 818-819: "The statute of limitations is a rule of procedure only; and foreigners suing here are only allowed the time limited by the statute of James, without reference to any limitation which may obtain in the country where the contract was made." Consequently, even in the case of a plaintiff domiciled in France when the cause of action arose, the statutory period began to run against him in England from the time of his "return" (that is, coming) to England. See also *Huber v. Steiner*, *supra*, note (h) in § 1 of the present chapter.

assumed to be in force in India where the cause of action arose, and it was held that under the same statutes, in force in England, the plaintiff's action in England was preserved by the fact that it was brought within six years after the defendant's return to England, although more than six years (during which the defendant was resident in India) had elapsed since the accrual of the cause of action in India. It is at least open to question whether it is just, in the case of a defendant in whose favour the foreign statute has run during his residence in the foreign country, to deprive him of the benefit of the domestic statute merely because he has come to the country of the forum less than the statutory period before action. The case has been followed in some Canadian cases without any suggestion that the result is unfair (*l*), but, as will be noted later, the situation is one which in some provinces of Canada and in some states of the United States has seemed to be a proper case for remedial legislation.

On the other hand, if the period of limitation has not yet run under the foreign statute, it would not appear to be unjust to deprive the nomadic defendant of the benefit of the domestic statute in his new residence by virtue of a tolling provision of that statute. This situation might arise in the case of an action upon a foreign judgment, normally barred after six years, although an action upon the judgment in the foreign country might not be barred because the period of limitation there might be twenty years.

In *Rutledge v. United States Savings and Loan Co.* (*m*) the Supreme Court of Canada reversed the judgment of the Territorial Court of the Yukon Territory in favour of the plaintiff company in an action brought in the Territory upon a foreign judgment. The period of limitation prescribed by an ordinance of the Yukon (1890, c. 31) being six years as upon a simple contract, the majority of the court held that the terms of the ordinance excluded the application of the statute of Anne by which time would not have run in favour of the defendant Rutledge until he came to the Yukon, and therefore the action in the Yukon was barred because more than six years had elapsed since the cause of action arose although less than six years had elapsed since the defendant came to the

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(*l*) *E.g., Carvell v. Wallace* (1873), 9 N.S.R. 165; *cf. Bugbee v. Clergue* (1900), 27 O.A.R. 96, s.c., affirmed, *sub nom. Clergue v. Humphrey* (1900), 31 Can. S.C.R. 66.

(*m*) (1906), 37 Can. S.C.R. 546.

Yukon. Idington J., one of the majority in the Supreme Court, said that the argument for the plaintiff involved reading the words "after the cause of action arose" in the ordinance as if they were followed by the words "in the Territory of the Yukon."

Possibly the *Rutledge* case and Idington J.'s reasons for judgment explain why in the uniform statute prepared by the Conference of Commissioners on Uniformity of Legislation in Canada (*n*), and adopted in Alberta, Manitoba, Saskatchewan and Prince Edward Island the provision suspending the running of the statute on account of the absence of the defendant is modified as follows:

If a person is out of the province at the time a cause of action against him *arises within the province* (*o*).

In the statutes of New Brunswick, Nova Scotia and Ontario there is no similar modification of the tolling provision relating to the defendant's absence from the province, and thus the former English law is perpetuated. In England, on the contrary, as already noted, the law has been changed by the omission of any provision relating to the absence of the defendant.

In British Columbia, there has been in force since 1868 (*p*) a provision which is now incorporated in R.S.B.C. 1936, c. 159, s. 55, as follows:

55. In case any action shall be instituted in this province against any person here resident, in respect of a cause of action or suit which has arisen between such person and some other person in a foreign country, wherein the person so sued shall have been resident at the time when such cause of action or suit shall have first arisen, such action shall not be maintained in any court of civil jurisdiction in the province if the remedy thereon in such foreign country is barred by any statute or enactment for the limitation of actions existing in such foreign country.

The foregoing provision is of course of especial interest, because it is not limited to the relatively narrow purpose of remedying the possible hardship that a nomadic defendant, in whose favour the statute of limitation of his former place of residence has run, may be deprived of the benefit of the foreign

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(*n*) See Conference Proceedings (1931) 34-53, and (1932) 26-31; Canadian Bar Association Year Book (1931) 280-299, and (1932) 194-199.

(*o*) See now R.S.A. 1942, c. 133, s. 49; R.S.M. 1940, c. 121, s. 40; R.S.S. 1940, c. 70, s. 49; P.E.I. 1939, c. 30, s. 45. The italics are mine.

(*p*) The Limitation of Actions Ordinance, 1868, s. 1.

statute by reason of a tolling provision of the statute of his new place of residence postponing the running of that statute during his absence. The British Columbia statute, in more general terms, gives the defendant the benefit of the foreign statute, (which would usually though not necessarily be a provision of the proper law of the cause of action), even though that statute might be characterized as procedural according to the test in use in the forum for distinguishing between substance and procedure. Obviously the legislature of British Columbia does not approve of the Anglo-American theory, according to which the forum usually reaches the conclusion that both the foreign statute and the domestic statute are procedural, and therefore the domestic statute alone is applicable, but the British Columbia statute deals perhaps too generously with the defendant if, as is probable, it still gives him the benefit of the domestic statute in the event of the plaintiff's remedy not being barred by the foreign statute—for example, if the period of limitation of the domestic statute is shorter than that of the foreign statute.

The British Columbia statute is a good example of what in the United States is called a "borrowing" statute. Statutes of this kind, which "borrow" the provisions of the law of other states, or direct a court in X to apply the provisions of the law of Y in certain circumstances (*q*), are in force in many of the states of the United States in various forms (*r*).

As regards the law of Quebec, I merely quote, without discussing, articles 2189, 2190 and 2191 of the Civil Code of Lower Canada (*s*).

2189. Prescriptions in respect of immoveable property are governed by the law of the place where it is situated.

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(*q*) In other words such a statute constitutes a conflict rule of the law of the enacting state.

(*r*) See *Legislation Governing the Applicability of Foreign Statutes of Limitation* (1935), 35 *Columbia L. Rev.* 762; Lorenzen, *Cases and Materials on the Conflict of Laws* (5th ed. 1946) 376, 377; Cheatham et al., *op. cit.* (note (i), *supra*) 562-569; Robertson, *Characterization in the Conflict of Laws* (1940) 252; comment (1945), 59 *Harvard L. Rev.* 291.

(*s*) For detailed discussion of these intricate provisions, see Johnson, *Conflict of Laws with Special Reference to the Law of the Province of Quebec*, vol. 2 (1934) 450 ff., and his *Extinctive Prescription: Conflict of Laws: Sources of Quebec Rules* (1941), 4 *U. of Toronto L.J.* 109; cf. Perrault, *Traité de Droit Commercial*, vol. 3 (1940) 959-962; my *Bills of Exchange Act in Quebec* (1942), 20 *Can. Bar Rev.* at p. 733.

2190. As regards moveable property and personal actions, even in matters of bills of exchange and promissory notes and commercial matters in general, one or more of the following prescriptions may be invoked:

(1) Any prescription entirely acquired under a foreign law, when the cause of action did not arise or the debt was not stipulated to be paid in Lower Canada, and such prescription has been so acquired before the possessor or the debtor had his domicile therein;

(2) Any prescription entirely acquired in Lower Canada, reckoning from the date of the maturity of the obligation, when the cause of action arose or the debt was stipulated to be paid therein, or the debtor had his domicile therein at the time of such maturity; and in other cases from the time when the debtor or possessor becomes domiciled therein;

(3) Any prescription resulting from the lapse of successive periods in the cases of the two preceding paragraphs, when the first period elapsed under the foreign law.

2191. Prescriptions commenced according to the law of Lower Canada are completed according to the same law, without prejudice to the right of invoking those acquired previously under a foreign law, or by a union of periods under both laws, conformably to the preceding article.

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## CHAPTER XIII.

### SUBSTANCE AND PROCEDURE

If a situation giving rise to litigation is a purely domestic one in the country of the forum, so that no question of the conflict of laws is involved, a court applies of course all the relevant rules of the law of the forum, whether those rules are procedural or are substantive, and usually there is no need to distinguish between substance and procedure. Nevertheless the court may for some domestic purposes be obliged sometimes to draw the distinction.

On the other hand, if the situation is so connected with some other country as to require the court, in accordance with the conflict rules of the law of the forum, to resort to the rules of law of that country as regards some question arising from the situation, it happens more frequently that the court is obliged to draw the distinction between substance and procedure. This result follows from the principle (if that is the right word) that a court always applies the procedural rules of the law of the forum, and that its resort to the rules of law of another country is limited to the substantive rules of that law.

The distinction between substance and procedure has been the subject of a considerable body of writing; and it seems worth while at this point to refer in a footnote to some of the significant articles on this topic written in English (*a*), in addition to the discussion to be found in all the general books

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(*a*) McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws* (1930), 78 U. of Penn. L. Rev. 933; *Delimitation of Procedure in the Conflict of Laws* (1933), 47 Harv. L. Rev. 315; Cook, "Substance" and "Procedure" in the Conflict of Laws (1933), 42 Yale L.J. 333, and "Characterization" in the Conflict of Laws (1941), 51 Yale L.J. 191, republished with "supplementary remarks, 1942" as chapters 6 and 8 of his book, *The Logical and Legal Bases of the Conflict of Laws* (1942); Mendelssohn-Bartholdy, *Delimitation of Right and Remedy in the Cases of Conflict of Laws* (1935), 16 Brit. Y.B. Int. Law 20; cf. review of Schoch, *Klagbarkeit, Prozessanspruch und Beweis im Licht des Internationalen Rechts* (1934), by Mendelssohn-Bartholdy (1935), 51 L.Q. Rev. 553, and by Rheinstein (1936), 84 U. of Penn. L. Rev. 438; Robertson, *Characterization in the Conflict of Laws* (1940) 245 ff.; Ailes, *Substance and Procedure in the Conflict of Laws* (1941), 39 Mich. L. Rev. 392.

on the conflict of laws, but omitting some articles specifically relating to the Statute of Frauds and the statutes of limitation, discussed in other chapters (*b*).

The principle that a court applies the domestic procedural rules of the law of the forum and that it refers only to the substantive rules of the law of another country in a situation connected with that country constitutes of course an outstanding limitation on any supposed conflict rule that the court is to "apply" the "law" of another country or that the "law" of that country "governs" or "determines" a given question in any sense of the word "law" (*c*).

Cook (*d*) has justly emphasized the relativity or variability of the distinction between substance and procedure. There is an inherent difficulty in drawing the line even in domestic law, and the line may be drawn in one place for one purpose and in another place for another purpose, and for some purpose of the conflict of laws the line may be drawn in still another place. It follows that in any case that is near the borderline between substance and procedure, it is impossible to characterize a rule of law in the abstract or for all purposes, and that the fact that the rule is characterized as procedural for some domestic purpose does not mean that it ought to be characterized as procedural for some purpose of the conflict of laws. In law, as in physical science, the line which is supposed to divide one category from another sometimes has no objective existence and cannot be "discovered" by analysis alone, but must be "drawn", regard being had to the particular purpose for which it is to be drawn (*e*).

Cook (*f*) mentions, by way of example, seven domestic purposes for which in the United States it may be important to distinguish between substance and procedure, and some of these examples might be used by analogy in Canada or England. In Canada the distinction may be important with regard to legislative power, as for example, under clause 14 of

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(*b*) See chapter 4, § 4 (Statute of Frauds), and chapter 12 (statutes of limitation).

(*c*) The ambiguities inherent in the words enclosed in quotation marks are discussed in chapter 2.

(*d*) In the articles cited in note (*a*), *supra*, republished with supplementary remarks in his book, *The Logical and Legal Bases of the Conflict of Laws* (1942). The subsequent citations of Cook in the present chapter refer to his book.

(*e*) Cook, *op. cit.* (note (*d*), *supra*) 155 ff.

(*f*) *Op. cit.* (note (*d*), *supra*) 163-165.

s. 92 of the British North America Act, 1867, which confers jurisdiction upon a provincial legislature to legislate in relation to a matter coming within "procedure in civil matters in [provincial] courts." The word "procedure" in this clause may have a different meaning from that which it has for the purposes of the conflict of laws (*g*). Again, the words "rules of practice and procedure" occurring in s. 106 of the Ontario Judicature Act (*h*) may have a different meaning from that which they or similar words might have in the conflict of laws.

If the distinction is to be drawn for the purpose of some rule of the conflict of laws of the law of the forum, it is submitted that the court should characterize both a domestic statute and a foreign statute for the purpose of determining which of them is applicable within the meaning of the particular conflict rule of the law of the forum. In an action upon a foreign cause of action the court should compare the two statutes and if it comes to the conclusion that, notwithstanding differences of wording, the two statutes are intended to perform essentially the same function, it should decide which of them is subsumed under the conflict rule of the law of the forum (*i*).

If the successful prosecution of an action is prevented by reason of a procedural rule of the law of the forum, there can be no resort to the law of another country and any conflict rule of the law of the forum which indicates that the proper law of the cause of action is the law of that country, or that the merits of the controversy should be decided by that law, is frustrated (*j*). Therefore a court should not, without due consideration of the consequences, characterize a rule of the law of the forum as procedural in the conflict of laws, even though the rule may be characterized as procedural for some domestic purpose.

If the successful prosecution of an action is not prevented by any procedural rule of the law of the forum, and resort to some

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(*g*) See my *Disorder of the Statutes of Limitation* (1943), 21 Can. Bar Rev. 669, 786, at p. 800.

(*h*) R.S.O. 1937, c. 100, amended by Ontario statutes, 1941, c. 24, which *inter alia*, creates a "rules committee" as the rule-making body in place of the "judges of the Supreme Court."

(*i*) Cf. chapter 12, § 3, with special reference to statutes of limitation.

(*j*) Cf. chapter 4, § 4 (Statute of Frauds), and chapter 12, § 1 (limitation of action or prescription).

foreign law is indicated by a conflict rule of the law of the forum, a court may have to characterize a rule of the foreign law as substantive or procedural, because if it is procedural, it is outside of the scope of the reference by the conflict rule to the foreign law (*k*), and the question arises to what extent the court should follow the characterization of the rule in the foreign law. If the foreign rule is characterized in the foreign law for some domestic purpose of the foreign law, the characterization is obviously immaterial. Even if the foreign rule is characterized in the foreign law for some purpose of the conflict rules of that law, it does not follow that the court must characterize the rule in the same way for some purpose of a conflict rule of the law of the forum; a different characterization may be required so as to give effect to the purpose of the conflict rule of the law of the forum (*l*).

However difficult it may sometimes be, historically, logically or in any other way, to distinguish between substance and procedure, the drawing of the distinction is inevitable.

Ailes (*m*) says:

It is preferable to rest the distinction upon the low practical ground that, without it, judicial business could hardly continue. . . . It is one thing to admit proof of foreign law to establish a tort, a contract or a conveyance; it is quite another to investigate the foreign law on every one of the multitude of points regarding summonses, affidavits, attachments, pleadings, trials, evidence, execution and costs which will arise.

Cook (*n*), discussing the meaning of a reference by a conflict rule to the law of another state on a question of damages, says:

Although it is often said that the 'substantive law' of the other state 'governs' the case, the word 'governs' is misleading: an American court does not hand the case over to the law of the foreign state for decision. If it allows a recovery, it merely decides, on grounds of social convenience, to give a right to damages "as nearly homologous as possible" to the right given by the foreign law. As a purely practical matter, however, it can not undertake to follow the rules for service of process, of pleading, of evidence, etc., of the foreign state. This is expressed in general language by saying that the forum will follow its own 'procedural law.' This distinction is one which is being drawn by the court of the forum for its own protection: it cannot devote too great effort to an attempt to give precisely what the foreign court would give. Whenever it is called upon to decide for the first time, in cases of this kind, whether a given rule of the purely domestic law of the foreign state shall be

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(*k*) Cf. chapter 4, § 4, and chapter 12, § 2.

(*l*) Cf. chapter 12, concluding part of § 2, leading on to suggested modes of solution in § 3.

(*m*) *Op. cit.* (note (a), *supra*) at p. 416.

(*n*) *Op. cit.* (note (d), *supra*) 222-223.

classified ('characterized') as 'substantive' or 'procedural', its problem is to decide *from the standpoint of its own practical convenience*, whether the rule in question is important enough to justify spending the time required to ascertain what that rule is and how it is to be applied (o).

Cook's statement just quoted, and his theory, referred to earlier (p), of the relativity or variability of the distinction between substance and procedure, are of course inconsistent with the theory that a reference by a conflict rule of the law of the forum to a foreign law involves the result that the characterization adopted in the foreign law of a rule of that law is a matter of "secondary" characterization which must be accepted as conclusive. Robertson, on one page of his book (q) pays lip service to Cook's theory of relativity or variability, and on the following page states his own theory of secondary characterization, apparently without perceiving the inconsistency between Cook's theory and his own (r).

I have in other chapters noted some reasons for finding fault with the tendency of English courts to characterize a statute as procedural because it is expressed in the form "no action shall be brought." This tendency is manifest in the judicial characterization of the Statute of Frauds (s), statutes of limitation (t), and the Gaming Acts of 1845 and 1892 (u), although in some cases the courts seek to justify the characterization on other or additional grounds.

It is submitted that *prima facie* a provision that "no action shall be brought" or other similar provision should not be characterized as procedural for any purpose of the conflict of

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(o) Cook's suggestion that in a case arising between two states of the United States the forum should characterize the rule of the other state as to burden of proof as substantive is apparently not approved by Ailes, *op. cit.* (note (a), *supra*) at p. 416. The suggestion is referred to in another connection in chapter 11, § 2, note (h). On the other hand, Ailes' general statement at p. 396 of Cook's theory as to substance and procedure is said by Cook, *op. cit.* (note (d), *supra*) 185, to be "an over-simplification, couched in language so broad and ambiguous as to be both useless, and, as a statement of my position, highly misleading."

(p) See note (d), *supra*.

(q) Characterization in the Conflict of Laws (1940) 245-246. Generally as to Robertson's theory of secondary characterization, see chapter 6, § 1.

(r) This is pointed out by Cook, *op. cit.* (note (d), *supra*) 237-238 ("Supplementary Remarks, 1942").

(s) See chapter 4, § 4.

(t) See chapter 12.

(u) See chapter 14, § 5(c).

laws, but should be construed merely as denying a cause of action for domestic purposes. If, as in the case of the Gaming Act, 1845 (*v*) and the Gaming Act, 1892 (*w*), a transaction is declared to be null and void, and it is also provided that no action shall be brought to recover any sum of money payable thereunder, it would appear to be clear that the latter provision is merely an emphatic, but unnecessary, mode of expression reinforcing the preceding declaration of nullity, and it is far-fetched to attribute to the legislature the intention of making the provision a procedural one for any purpose of the conflict of laws.

Similarly, in Ontario the Medical Act requires the registration of all persons who practise medicine or surgery within the province, and imposes penalties for non-registration, and declares that a registered person may recover reasonable charges for his services. The statute also contains a provision (*x*) that no person shall be entitled to recover any charge in any court for medical or surgical services unless he produces to the court a certificate that he was registered under the statute at the time the services were rendered. It is submitted that there is no justification for construing this provision as procedural so as to prevent a person who practises medicine or surgery outside of Ontario and renders services outside of Ontario from bringing an action in Ontario to recover reasonable charges for his services (*y*).

As regards the Moneylenders Act, the decision in *Nihalchand Navalchand v. McMullen* (*a*) is not a clear-cut one, because the court merely declined to enter judgment in default of appearance on a specially endorsed writ, and the plaintiff was of course at liberty to make a subsequent motion for judgment upon proof of the facts, and on that occasion the court would have the opportunity of reconsidering the characterization of the statute. As it was, the court cited decisions under the Statute of Frauds and the Gaming Acts, and provisionally sug-

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(*v*) Statute of the United Kingdom, adopted in Ontario and now appearing in R.S.O. 1937, c. 297, s. 4.

(*w*) Statute of the United Kingdom, adopted in Ontario and now appearing in R.S.O. 1937, c. 297, s. 5.

(*x*) R.S.O. 1937, c. 225, s. 50, re-enacting 1932, c. 22, s. 21.

(*y*) So far as the contrary was decided in *Johnson v. Pepler* (1932), 41 O.W.N. 207, the decision would appear to indefensible. The right conclusion was reached in similar circumstances in the Nova Scotia case of *Wilmot v. Shaw* (1881), 14 N.S.R. 343.

(*a*) [1934] 1 K.B. 171.

gested that they might be applicable, that is, that the Money-lenders Act might be characterized as procedural so as to prevent the moneylenders from suing in England upon a contract of loan made abroad. An earlier statute had been held to be inapplicable to a contract made abroad (*b*).

On principle it is difficult to understand why a rule of law which denies a right of action should be construed as procedural. Even if a right of action is sometimes regarded as in the nature of a remedy (*c*), remedy is a wider concept than procedure. To say that a provision of a statute, or of a contract, that no action shall be brought is procedural would seem to be inconsistent with the decision of the House of Lords, on an appeal from Scotland, in *Hamlyn & Co. v. Talisker Distillery* (*d*) in which it was held that the proper law of the contract, sued on in Scotland, was English law, and that a provision of the contract, that "should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way," was not procedural, but substantive. Consequently the action in Scotland was stayed, the provision being valid by English law, but, by reason of the fact that the reference was not to named arbitrators, invalid by Scottish law. Lord Watson said (*e*):

It has never, so far as I am aware, been seriously disputed, that, whatever may be the domicile of a contract, any court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. . . . I can find no authority, and none was cited to us to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*.

In the United States the general view adopted by the courts is that a provision for reference to arbitration is procedural (*f*),

(*b*) *Shrichand & Co. v. Lacon* (1906), 22 Times L.R. 245; cf. Westlake, *Private International Law*, § 341.

(*c*) In reality it is an inversion of cause and effect to say that a person has a right of action because he has a right, the truth being that he has a right because it can be predicted that by action or other appropriate proceeding he can invoke the power of the state in his favour: cf. chapter 2, § 2(2).

(*d*) [1894] A.C. 202; cf. *Spurrier v. La Cloche*, [1902] A.C. 446.

(*e*) [1894] A.C. 202, at pp. 213, 214.

(*f*) See Lorenzen, *Cases and Materials on the Conflict of Laws* (5th ed. 1946) 199 ff.; 2 Beale, *Conflict of Laws* (1935) 1245 ff.

but this view has been much criticized (*g*).

In *Livesley v. E. Clemens Horst Co.* (*h*), on appeal to the Supreme Court of Canada in an action brought in British Columbia on a contract of sale of goods of which the proper law was the law of California, Duff J. (afterwards C.J.C.), said: . . . the policy of the English law recognizes no vested rights in procedure, and a party invoking the jurisdiction of the courts must take procedure as he finds it. The concept of procedure, too, is, in this connection, a comprehensive one, including process and evidence, methods of execution, rules of limitation affecting the remedy, and the course of the court with regard to the kind of relief that can be granted to a suitor. But it does not, of course, extend to substantive rights; and here questions as to substantive rights include all questions as to the 'nature and extent of the obligation' under the foreign contract.

The decision of the court was that the substance of the contractual obligation includes the measure of damages for breach of the contract and, in particular, the lien given to the seller by the proper law and the accessory right of sale, and the right of the seller to recover the difference between the contract price and the amount realized on the sale, so that all these matters are governed by the proper law and not by the domestic rules of the law of the forum. The decision would appear to be clearly right in the result (*i*), even though the definition of the concept of procedure is too widely stated in so far as it suggests that a matter of remedy is necessarily a matter of procedure (*j*). It is possible, or probable, that the remedy by way of specific performance, as distinguished from damages, might be characterized as procedural. In the same case Duff J. also suggested that the measure of damages in tort, as in contract, is part of the substance of the obligation. This suggestion would appear to be right (*k*).

In an action brought in Ontario against a mortgagor resident in Ontario upon a covenant to pay contained in a mortgage on

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(*g*) Heilman, *Arbitration Agreements and the Conflict of Laws* (1929), 38 Yale L.J. 617; Phillips, *Arbitration and Conflicts of Laws* (1934), 19 Cornell L.Q. 197; Lorenzen, *Commercial Arbitration: International and Interstate Aspects* (1934), 43 Yale L.J. 716, 733, 757, (1935), 45 Yale L.J. 39; *cf.* (1934), 47 Harv. L. Rev. 318-319.

(*h*) [1924] S.C.R. 605, at p. 608, [1925] 1 D.L.R. 159, at p. 161.

(*i*) Hohfeld, *Fundamental Legal Conceptions* (1923) 234, note 11, had already stated a similar view as "the fair inference from the English cases."

(*j*) *Cf.* note (*c*), *supra*; Taintor, *Universality in the Conflict of Laws of Contract* (1939), 1 Louisiana L. Rev. 695, at pp. 717, 718.

(*k*) See chapter 45.

land in Alberta, it was held (*l*) that the remedy by way of personal order against the defendant for payment was governed by Ontario law, the *lex fori*, and not by the Alberta statute prescribing the remedy in an action brought upon a mortgage of land and settling the form of judgment for the realization of the mortgage debt out of the land. Different considerations would, however, apply to an action brought in Ontario for foreclosure as to land in another province. As is suggested in another chapter (*m*), a court, before entertaining such an action, ought to be satisfied that the relation of mortgagee and mortgagor and the consequent remedies of the mortgagee according to the *lex rei sitae* are substantially the same as in the case of a mortgage of land in Ontario.

Broadly speaking, it is customary in the conflict of laws to characterize as procedural such matters as forms of action, parties to an action, venue, rules of practice and pleading, proof of facts, admissibility of evidence, rebuttable presumptions and burden of proof; and it has been suggested that the line between substance and procedure should be drawn on the basis of the general distinction between procedural rules which concern methods of presenting to a court the operative facts upon which legal relations depend, and substantive rules which concern the legal effect of those facts after they have been established (*n*). It is not practicable in the present chapter to discuss further the question whether the generality of the statements made in this paragraph may prove elusive on analysis of particular situations (*o*).

In the case of *In re Cohn* (*p*) Mrs. Cohn and her daughter Mrs. Oppenheimer, German nationals domiciled in Germany, were on October 14, 1940, killed in London, England, as a

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(*l*) *Northern Trust Co. v. McLean* (1926), 58 O.L.R. 683, [1926] 3 D.L.R. 93; to the same effect, in an action brought in Saskatchewan for payment of the purchase price under a contract for the sale of land in Alberta, see *Royal Trust Co. v. Kritzwiser*, [1924] 3 D.L.R. 596, [1924] 2 W.W.R. 760.

(*m*) See chapter 30, § 3.

(*n*) Stumberg, *Conflict of Laws* (1937) 128 ff.

(*o*) Stumberg, *loc cit.*, discusses possible modifications of these statements; cf. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942), the whole of his chapter on Substance and Procedure, from which some passages have been mentioned early in the present chapter.

(*p*) [1945] Ch. 5. This present comment on the *Cohn* case originally appeared (1945), 23 Can. Bar Rev. 448. See also a comment by Morris (1945), 61 L.Q. Rev. 340.

result of an explosion caused by a German air raid in circumstances rendering it uncertain which of them survived the other. Letters of administration with a translation of the will of Mrs. Cohn, were granted in England to the Public Trustee, and an English court had to decide whether the administration of the estate should proceed on the footing that Mrs. Oppenheimer survived her mother (so as to take under a gift in the will to the three daughters of the testatrix in equal shares) or on the footing that Mrs. Oppenheimer did not survive her mother. The subject of this gift being movables, the law governing succession would of course be German law, whereas any matter of evidence relating to administration as distinguished from succession would be governed by English law. German law provides that if it cannot be proved that of several deceased persons or persons declared dead one has survived the other, it is presumed that they have died simultaneously. English law (s. 184 of the Law of Property Act, 1925, substantially the same as s. 1 (1) of the Ontario Statutes, 1940, c. 4) provides that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, the deaths shall, for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be presumed to have survived the elder. It was held by Uthwatt J. that these statutory provisions were not rules of evidence, but were substantive provisions of their respective laws, and that the German statute was applicable as part of the domiciliary law of succession. Consequently Mrs. Cohn's estate was to be distributed on the footing that Mrs. Oppenheimer did not survive her mother.

The result of the decision was that the movables of the estate of Mrs. Cohn were distributed directly between Mrs. Oppenheimer's surviving sisters (under a gift to Mrs. Cohn's children in equal shares). In other words, there was one succession under Mrs. Cohn's will instead of there being two successions, that is, to Mrs. Cohn's estate and to Mrs. Oppenheimer's estate. A similar result might have been reached by a finding of fact that the deaths were simultaneous, so as to exclude the operation of s. 184 of the Law of Property Act, 1925, on that ground (q). In the *Cohn* case, however, Uth-

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(q) See *In re Grosvenor, Peacey v. Grosvenor*, [1944] Ch. 138, and *Re Mercer, Tanner v. Mercer*, [1944] 1 All E.R. 759, discussed (1945), 23 Can. Bar Rev. 70; see also *In re Howard, Howard v. Treasury Solicitor*, [1944] P. 39.

watt J. found "as a fact that the circumstances in which Mrs. Cohn and Mrs. Oppenheimer were killed were such that it is uncertain and cannot be proved which of them survived the other," and it was therefore necessary for him to consider the question of the conflict of laws, namely, whether the statute of 1925 was inapplicable on the ground that it was part of English succession law, limited in its application to a succession governed by English law. The following passage from his judgment states his course of reasoning (r):

The mode of proving any fact bearing on survivorship is determined by the *lex fori*. The effect of any fact so proved is for the purpose in hand determined by the law of the domicile. The fact proved in this case is that it is impossible to say whether or not Mrs. Oppenheimer survived Mrs. Cohn. Proof stops there. Section 184 of the Law of Property Act, 1925, does not come into the picture at all. It is not part of the law of evidence of the *lex fori*, for the section is not directed to helping in the ascertainment of any fact but contains a rule of substantive law directing a certain presumption to be made in all cases affecting the title to property. As a rule of substantive law the section is relevant where title is governed by the law of England. It has no application where title is determined by the law of any other country.

In *Leong Sow Nom v. Chin Yee You* (s), the plaintiff, as administrator of the estate of Leong Woo, brought an action in British Columbia for damages arising from the death of the said Leong Woo, alleged to have been caused by the wrongful act, neglect or default of the defendants. The action was brought under a statute of British Columbia for the benefit of the alleged wife and children of Leong Woo, and it was essential to the plaintiff's cause of action to prove the marriage of Leong Woo and his alleged wife, which was said to have been celebrated in China, where both parties were, apparently, domiciled at the time of the alleged marriage. The action was dismissed on the ground that the proof of the marriage was not sufficient, there being no direct evidence of the fact of its celebration and no evidence of the law of China, and the court being of opinion that it was not entitled to presume the due celebration of a marriage from the fact that the parties cohabited together in China and were there regarded by their friends, neighbours and relatives as husband and wife, notwithstanding

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(r) [1945] Ch. 5, at pp. 7, 8.

(s) (1934), 49 B.C.R. 244, [1934] 3 W.W.R. 686, Robertson J., Supreme Court of British Columbia. The present comment appeared originally (1935), 13 Can. Bar Rev. 317, but has been substantially revised.

that by the law of British Columbia the due celebration of the marriage would be presumed in similar circumstances.

The foregoing case suggests interesting questions, with particular reference to the characterization of presumptions in the conflict of laws. It is arguable at least that the presumption of the due celebration of a marriage is what is usually called a rebuttable presumption of law, and relates to the proof of facts, as distinguished from the question what facts must be proved, and should be characterized as procedural (*t*), and therefore that the court ought to have held that the due celebration of the marriage was sufficiently proved in accordance with the procedural rules of the law of the forum. Contrasted with a rebuttable presumption is a so-called conclusive or irrebuttable presumption of law, which is a rule of substantive law disguised under the name of a presumption, and which does not relate to the manner of proving facts but prevails without regard to the facts (*u*). On the other hand it has been suggested that in some circumstances even rebuttable presumptions are in effect rules of substantive law (*v*), and that while proof, presumptions and burden of proof are ordinarily treated as procedural, they are sometimes so closely connected with the rights of the parties that they should be regarded as substantive (*w*).

As to the mixed questions of substance and procedure that may rise in connection with set-off and compensation, and joint liability, see chapter 14, § 10. As to the distinction between status and procedure, see chapter 4, § 8, and as to the distinction between formalities of contract and procedure, see chapter 4, § 4.

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(*t*) Cf. Goodrich, *Conflict of Laws* (2nd ed. 1938) 198.

(*u*) See MacRae, *Evidence*, in 4 C.E.D. (Ont.) 416, 760, 773, with references to Thayer, Wigmore and Phipson; cf. Goodrich, *op. cit.*, p. 199.

(*v*) Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 177 ff.

(*w*) Stumberg, *Conflict of Laws* (1937) 131.

## CHAPTER XIV.

### BILLS AND NOTES; HEREIN OF CONTRACTS\*

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\* §§ 1, 2 and 3 of this chapter originally appeared, under the title Conflict of Laws Relating to Bills and Notes (1928), 6 Canadian Bar Review 356, 430. The chapter as a whole appeared in my Banking and Bills of Exchange (5th ed. 1935) 860-917, and is reproduced here with substantial changes.

- §10. Set-off; discharge of obligation; joint obligation, p. 325.  
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### § 1. Introduction.

In the present chapter the primary subject for discussion will be the rules of the conflict of laws relating to bills of exchange, promissory notes and cheques, including the relevant provisions of the Bills of Exchange Act, together with some discussion of the rules of the conflict of laws relating to contract in general.

The Bills of Exchange Act, 1882, is a codification of the law of bills and notes which was enacted in and for the United Kingdom, and includes some minor mutual concessions on which English law (prevailing also in Ireland) and Scottish law formerly differed, and some provisions preserving as to Scotland certain features of Scottish law. It was not specifically drawn in such a way as to render it exactly suitable for enactment elsewhere, and, as will be seen later, some curious results follow from the fact that it has been widely re-enacted in or for other parts of the British Empire without adequate consideration of some of its language.

The statute was adopted in 1890 by the Parliament of Canada, and now appears as chapter 16 of the Revised Statutes of Canada, 1927. As adopted, it omits of course the provisions of the original statute specially applicable to Scotland, but includes some provisions preserving as to Quebec certain special rules of the law of bills and notes prevailing in that province. It is of course part of the law of every province of Canada.

The Canadian statute of 1890 omitted the important provision contained in s. 97(2) of the original statute of 1882, but in 1891 this provision was restored, and it now appears in R.S.C. 1927, c. 16, s. 10, as follows:

10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall apply to bills of exchange, promissory notes and cheques.

Whereas in the United Kingdom this section has not been the subject of much judicial construction or extra-judicial comment, in Canada it has been the subject of considerable controversy, on account especially of the differences existing between the background of commercial law of the province of Quebec and

that of the other provinces. In the latter provinces it is usually immaterial whether in a case for which express provision is not made by the statute resort is to be had to the common law of England or the provincial law, although occasionally there may be a difference between the two laws by reason of divergent legislation. In Quebec, on the other hand, it is a matter of lively concern that the scope of s. 10 should not be extended so as to make applicable English commercial law in place of the French commercial law of Quebec beyond what is necessary to give effect to the purpose of the statute, that is, to provide a uniform code of bills and notes. Consequently the cases have drawn a distinction between the law of bills and notes in a strict sense, (which is within the legislative power of the Parliament of Canada under s. 91 of the British North America Act and to which s. 10 applies so as to make applicable the common law of England) and, outside of the law of bills and notes in a strict sense, the law governing the rights and duties of parties to a bill or note transaction, (which may be within the legislative power of a provincial legislature under s. 92 of the British North America Act, 1867, and is beyond the scope of s. 10). This is a question of legislative power, and to the extent that a matter falls within s. 10, the law of the provinces is uniform and no question of the conflict of laws arises between them, whereas if a matter is beyond the scope of s. 10, the law of one province may be different from that of another province, and the ordinary rules of the conflict of laws may be applied (a).

The cases decided under s. 10 are relatively simple from the point of view of the conflict of laws in that in each case the transaction was wholly confined to one province of Canada, that is to one "country," in the conflict of laws sense (b), and the question of the choice of law was one between the domestic law of the province and the domestic law of England, the latter law being applicable, if applicable at all, only by reason

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(a) Questions of legislative power in connection with bills and notes are of course beyond the scope of the present book. I have discussed some of these questions in *Banking and Bills of Exchange* (5th ed. 1935) 508 ff.; *The Bills of Exchange Act in Quebec* (1942), 20 Can. Bar Rev. 723; *The Disorder of the Statutes of Limitation* (1943), 21 Can. Bar Rev. 669, at pp. 804 ff. As regards questions of the conflict of laws that might arise between Quebec and some other province of Canada even under a provision of the Bills of Exchange Act expressed in terms borrowed from the domestic law of England, see § 5(a) of the present chapter, *infra*.

(b) See chapter 1.

of the provisions of the Bills of Exchange Act, in force in the province in question as part of the Dominion of Canada. The cases suggest, however, interesting possibilities as to conflict of laws arising from transactions taking place partly in one country and partly in another, and it would appear that the conflict of laws may be either one of two kinds. Firstly, it may be a choice between two laws of bills and notes strictly speaking, or, secondly, it may be a choice between two laws relating to rights and duties incidentally arising in a bill or note transaction.

Conflict of laws of the first kind may arise (1) between Quebec and one of the other provinces of Canada, by reason of certain provisions of the Canadian Bills of Exchange Act applicable only to Quebec (as, for example, those relating to legal holidays and the necessity for protest), but can hardly arise between the other provinces; (2) between any province of Canada and any country of the British Empire other than a province of Canada, by reason of the differences between the Bills of Exchange Act as adopted in Canada and the Bills of Exchange Act as adopted in the other country in question; (3) between any province of Canada and a state of the United States of America, by reason of differences between the Bills of Exchange Act and the Negotiable Instruments Act; and (4) *a fortiori* between any province of Canada and any other foreign country, by reason of differences in their respective laws of bills and notes strictly speaking.

Conflict of laws of the second kind may arise (1) between any two provinces of Canada, but more probably between Quebec and one of the other provinces; and (2) between any province of Canada and any other country, more probably but not exclusively between two countries having fundamentally or substantially different systems of law, as, for example, between Quebec and England or New York, or between Ontario and Scotland or Louisiana.

Owing to the ambulatory character of bills and notes, the law as to these instruments affords a peculiarly interesting field for the application of rules of the conflict of laws. It happens also that it is in this field of law that the only legislative attempt in English law to codify the rules of the conflict of laws has been made. It is therefore rather disconcerting to find that the legislative provisions are not entirely satisfactory, (1) because they are in some respects ambiguous, and (2) because they are in some respects difficult to reconcile with the pre-

vailing rules of the conflict of laws applicable to contract in general.

In Canada the provisions of the Bills of Exchange Act (originally enacted in 1890, now R.S.C. 1927, c. 16) relating to the conflict of laws are contained in ss. 160 to 164, corresponding with sub-ss. 1, 2, 3, 4 and 5 of s. 72 of the Bills of Exchange Act, 1882, as enacted in and for the United Kingdom. Before 1906 these provisions were all parts of one section of the Canadian statute, as they are in the original statute, and were all governed by the words which introduced the section, namely, "Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows." The matters expressly provided for include the formal validity of a bill and the supervening contracts (s. 160), the interpretation of the drawing, endorsement or acceptance of a bill (s. 161), the duties of the holder with respect to presentment and the necessity for or sufficiency of a protest or notice of dishonour (s. 162), the calculation of the amount of a bill drawn out of but payable in Canada, in which the sum payable is not expressed in the currency of Canada (s. 163), and the ascertainment of the due date (s. 164). If the provisions of the statute are inconsistent with the general rules of the conflict of laws relating to contracts and the transfer of the property in things, the statute of course governs, but the provisions of the statute are not exhaustive and cases may arise in which recourse must be had to the general rules of the conflict of laws (c).

## § 2. Formal Validity of a Bill and of the Supervening Contracts.

### (a) *The Bills of Exchange Act.*

In Canada it is provided by the Bills of Exchange Act, R.S.C. 1927, c. 16, s. 160 (corresponding with s. 72(1) of the Bills of Exchange Act, 1882, as enacted in and for the United Kingdom):

160. Where a bill drawn in one country is negotiated, accepted or payable in another, the validity of the bill as regards requisites in form is determined by the law of the place of issue, and the

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(c) *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, at p. 686, [1904] 2 K.B. 870, at pp. 875-6. As to this case see § 4(d) of the present chapter, *infra*.

validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance *supra* protest, is determined by the law of the place where the contract was made: Provided that

(a) where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

(b) where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Canada.

As to the principle stated in this section, Chalmers (*d*) cites a passage from the judgment of Knight Bruce V.C. in *Guépratte v. Young* (*e*). This case, however, related to the contractual capacity of a married woman, and the passage in question was merely a statement approving, as being a rule of general application to movables and personal obligations, the rule of French law that *la loi du lieu où se passe chaque acte en régit la forme*, or, in the shorter but less exact Latin phrase, *locus regit actum*.

As Dicey points out (*f*), the principle stated in the section, independently of the provisos by which the effect of the section is modified, exactly corresponds with the general rule as to the formal validity of contracts (his rule 159), as to which he says (*g*): "The one principle of English law with regard to the law regulating the form of a contract, or the formalities in accordance with which a contract is made, is that the form depends both affirmatively and negatively, upon the law of the country where the contract is made," and then, quoting from Westlake, "the formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in England" (§207), and "the formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are also necessary for its validity in England" (§209). Dicey recognizes certain exceptions to his general rule, but they are either irrelevant to the present subject or are inconsistent, so far as bills and notes are concerned, with the provisions of the statute.

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(*d*) Bills of Exchange (9th ed. 1927) 279, notes to s. 72(1); cf. 2nd ed. 1881, p. 53.

(*e*) (1851), 4 De G. & Sm. 217, at pp. 227-8, 5 R.C. 848, at p. 857.

(*f*) Conflict of Laws, notes to his rule 172 (5th ed. 1932) 704.

(*g*) *Ibid.*, p. 642.

In the case of documents such as bills and notes, the negotiability of which may depend on their form, and which are likely to be transferred to subsequent holders who may be ignorant of the circumstances in which they were originally signed and issued, or transferred to earlier holders, a rigid conflict rule referring all matters of formalities to the place of issue, or the place of making (*h*) of each subsequent contract on the bill or note, would seem to be justifiable.

It is not so clear, in the case of commercial contracts in general that formalities should be governed exclusively by the law of the place of making of the contract, and the following statement of Lorenzen (*i*) deserves serious consideration:

Whenever the formalities of a legal transaction are regarded in Anglo-American law as pertaining to the "substance" of a legal transaction, instead of relating to "procedure," they are deemed to belong to the operative facts which go to make up the validity of the legal transaction, and are governed by the law determining the validity of the legal transaction in general. No special rules have been developed relating to "formalities" in general (*j*).

In English law, as distinguished from Anglo-American law generally, it seems to be well established that a contract is formally valid if it complies with the law of the place of making, but if the place of making is casual or accidental in the sense that the transaction is in other respects wholly unconnected with that place, so that the proper law of the contract (*k*) governing its intrinsic validity is the law of another place, it would be unreal to the point of absurdity to say that the contract is formally invalid because it does not comply with the law of the place of making, although it does comply with the proper law (*l*).

### (b) *The Place of Making of a Contract.*

The place of making of a contract, the place where a contract was made, the place of contracting, or other similar ex-

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(*h*) As to the "place of making", see heading (b) in the present § 2, *infra*.

(*i*) The French Rules of the Conflict of Laws (1928), 38 Yale L.J. 165, at p. 166; cf. 6 Répertoire de Droit International (Paris, 1930) 317. For fuller discussion, see Lorenzen, The Validity of Wills, Deeds and Contracts as regards Form in the Conflict of Laws (1911), 20 Yale L.J. 427.

(*j*) As to "substance" and "procedure," see chapter 13.

(*k*) As to the proper law of a contract, see § 5(a) of the present chapter, *infra*, and chapter 16.

(*l*) Cf. Cheshire, Private International Law (2nd ed. 1938) 244.

pression, is often referred to in the discussion of contracts in the conflict of laws as the connecting factor used in the selection of the proper law (*m*) governing some question as to the validity or effect of a contract. Sometimes, however, there are inherent difficulties in the ascertainment of the place of making of a contract, especially if the transaction is not one into which the parties have entered face to face or is not one which takes place wholly within the limits of a single country.

Beale says that the place of contracting properly means the place in which the final act was done which made the promise or promises binding (*n*), and, as applied to a negotiable instrument, means specifically the place in which a particular contract on the instrument, whether that of drawer, maker, acceptor or endorser, after being signed by the party in question, was delivered for value (*o*).

Propositions such as those which are stated in the foregoing paragraph might be quite appropriate in the domestic rules of an Anglo-American, or common law, country, but are, it is submitted, quite inappropriate in a statement of rules of the conflict of laws. They involve a confusion between the factual elements of a situation and the legal results of those factual elements (*p*). They assume for the purpose of ascertaining the place of contracting that a contract has been made, when the very question in issue is whether a contract has been made, and this can be determined only after the proper law has been selected and the proper law has been applied to the factual situation (*q*).

For the purposes of the conflict of laws the place of making of a contract should be ascertained on the basis of what is said or done by the parties, dissociated so far as possible from any question of law. For example, the place of making of a con-

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(*m*) See § 5(a) of the present chapter, *infra*, and chapter 16.

(*n*) 2 Beale, *Conflict of Laws* (1935) 1045; *cf.* Goodrich, *Conflict of Laws* (2nd ed. 1938) 262.

(*o*) 2 Beale, *op. cit.*, 1047-1048; *cf.* *Conflict of Laws Restatement*, §§ 312, 313, 320; *Chapman v. Cottrell* (1865), 34 L.J. Ex. 186; *Baring v. Inland Revenue Commissioners*, [1898] 1 Q.B. 78.

(*p*) *Cf.* Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 364, 365.

(*q*) This is clearly enough stated, in other words, in the comments following § 311 of the *Conflict of Laws Restatement*, but the section itself contains the cryptic statement that the place of contracting is the state by the law of which questions concerning the formation of a contract are to be determined.

tract is where the parties exchanged promises which are alleged to constitute a bilateral contract, or where a party makes a promise which is alleged to constitute a unilateral contract. In the case of a bill or note, the promise of the drawer or maker is made where he completes the issue of the instrument by delivering it, and any subsequent promise on the instrument is made where a person signing as acceptor or endorser, as the case may be, delivers it. Whether any of these promises is binding in law, that is, is a contract or part of a contract, is another question which can be answered only when the proper law is selected and applied.

The subject is complicated in the conflict of laws in two respects. Firstly, in continental Europe generally, and under the Geneva Convention of 1930, the place of signature, rather than the place of delivery, is regarded as the place of contracting (*r*). Secondly, in the case of contracts alleged to be made by correspondence, the general Anglo-American view is that if an acceptance by post is expressly or impliedly invited, the acceptance is complete when and where it is posted (*s*), whereas in some other countries opinions are divided between the place of posting the acceptance and the place of its receipt by the offeror (*t*).

(c) *Formal Validity, Intrinsic Validity and Procedure.*

It is sometimes difficult to distinguish between a requirement of a certain form for the making of a contract, (a matter of essential formalities, governed as a general rule by the law of the place of making of the contract), and a requirement with regard to the proof of the contract, (a matter of procedure governed by the domestic rules of the law of the forum). The distinction between form of contract and procedure has been

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(*r*) Gutteridge, *Unification of the Rules of Conflict relating to Negotiable Instruments* (1934), 16 Jo. Comp. Leg. (3rd series) 67, 70. As to the Geneva Convention, see also § 12 of the present chapter, *infra*.

(*s*) See, e.g., *Adams v. Lindsell* (1818), 1 B. & Ald. 689; *Henthorn v. Fraser*, [1892] 2 Ch. 27; 2 Beale, *Conflict of Laws* (1935) 1071. As to Quebec, see *Magann v. Auger* (1901), 31 Can. S.C.R. 186; *Charlebois v. Baril*, [1928] S.C.R. 88, [1927] 3 D.L.R. 762.

(*t*) See K. K. Miazza, *Contracts by Correspondence in Anglo-American, French and Louisiana Law* (1935), 9 Tulane L.R. 590.

discussed with particular reference to the Statute of Frauds, in another chapter (a).

Of especial interest in the law of bills and notes is the decision of an English court that if a contract made in a foreign country is there void for want of a stamp, it is invalid in England, whereas if it is merely inadmissible in evidence in the foreign country, it is valid in England (b).

The distinction between form and procedure is merely one phase of the general distinction between substance and procedure, discussed in other chapters (c). As contrasted with the procedural rules of the law of the forum, which apply to an action upon any contract without regard to any foreign law, there may be substantive rules of law of different countries between which a choice must be made by the forum, so as to make applicable the law of the place of making as regards the formal validity of the contract, and the proper law of the contract as regards the intrinsic validity of the contract (d).

#### (d) *Anomalous Situations.*

The difficulty arising from the possibility that a bill issued abroad may be invalid by reason of the absence of a stamp is avoided to a limited extent by proviso (a) of s. 72(1) of the Bills of Exchange Act, 1882 ("Where a bill is issued out of the United Kingdom it is not invalid [in the United Kingdom] by reason only that it is not stamped in accordance with the law of the place of issue"), the principle applied, according to Dicey (e), being "the doctrine of the indifference of English law to the revenue law of other countries, aided in operation by the consideration that for business purposes it would be very unfortunate if it were necessary to consider in the case of foreign bills the validity of the absence or otherwise of a

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(a) See chapter 4, § 8, discussing, *inter alia*, *Leroux v. Brown* (1852), 12 C.B. 801.

(b) *Bristow v. Sequeville* (1850), 5 Exch. 275 (discussed in chapter 4, § 8), distinguishing *Alves v. Hodgson* (1797), 7 T.R. 241; cf. *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, at pp. 690-1.

(c) Chapter 13, and (with particular reference to limitation of actions and prescription) chapter 12.

(d) As the selection of the proper law, see § 5(a) of the present chapter, *infra*, and chapter 16.

(e) Conflict of Laws, notes to his rule 172 (5th ed. 1932) 704-705. The passage quoted appears for the first time in the 1927 edition of Dicey.

stamp" (f). But the proviso does not cover the converse case, that is, a bill issued in England unstamped is invalid in England though negotiated abroad (g); and the bill in the last mentioned case, though invalid in England, would in Canada be rendered valid by proviso (a) of the corresponding section of the Canadian statute (s. 160). One must not blame the draftsman, who draws a statute only for the United Kingdom, for the unfortunate result of the adoption in some other part of the British dominions of the very words of the statute, subject only to the substitution for the words "the United Kingdom" of some other territorial unit, but the result is bound to be unfortunate when partial or one-sided exceptions are made to a rule of the conflict of laws, because the result must be to increase the number of cases in which a transaction is valid in one country and invalid in another.

Proviso (b) also is a partial deviation from the general rule that the *lex loci celebrationis* governs the formal validity of a bill, but it is operative only "as between all persons who negotiate, hold, or become parties to it in the United Kingdom," [in the Canadian statute, "in Canada"]: As Byles observes (h), the proviso would now appear to cover the case where bills, drawn in France on an English drawee in the English form to the drawer's order, which required therefore to be endorsed by the drawer before issue, were in fact endorsed in blank by the drawer in France to an Englishman domiciled in England, a form of endorsement irregular under the then French law, so that the bills were irregular at their first issue. In the case of *In re Marseilles Extension Railway & Land Co.* (i), the acceptor was held liable on such a bill to a subsequent holder under an English endorsement. The fact that the French endorsement was invalid in France was held to be immaterial, the bill being regarded as an English bill. Such bill is not now within the definition of an inland bill (j), and

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(f) Cf. *James v. Catherwood* (1823), 3 Dow. & Ry. 190, at p. 191, Abbott C.J.

(g) *Bank of Montreal v. Exhibit & Trading Co.* (1906), 22 Times L.R. 722, 11 Com. Cas. 250.

(h) Bills of Exchange (19th ed. 1931) 309; cf. Dicey, *op. cit.* (5th ed. 1932) 706.

(i) (1885), 30 Ch. D. 598. The bills in question were issued before the passing of the Bills of Exchange Act, 1882. This case is further discussed in § 4 of the present chapter.

(j) Bills of Exchange Act, 1882, s. 4; Canadian statute, s. 25.

therefore could not be regarded as an English bill, but nevertheless the case would apparently fall within proviso (b).

The situation is anomalous at best. In effect the plaintiff gets a good title against the defendant notwithstanding that there is an invalid link in the chain of title, and that the plaintiff could not recover from the drawer-endorser. But in the analogous case of a subsequent endorsement in France in a form invalid by French law but valid by English law, proviso (b) would apparently not cure the defect as to any party, while if a bill is drawn and payable in France without expressing the consideration (and therefore invalid under the former French law) and is endorsed in England, the endorser may be sued in England under proviso (b), though the drawer would not be liable (*k*). Here, however, we are on the verge of the broader question as to what law governs the transfer of a bill abroad—a question the discussion of which will be postponed for the present (*l*).

The anomalous position under proviso (b) of a bill regarded as a whole appears in *Guaranty Trust Co. of New York v. Hannay* (*m*). There the defendants, in Liverpool, bought cotton from dealers in Alabama, who drew a bill of exchange on the defendants' bank in Liverpool, payable to drawers' order, and containing the words "and charge the same to the account of <sup>100</sup>  
R.S.M.I.—bales of cotton." This bill of exchange, with a bill of lading for the cotton attached, was purchased in good faith by the plaintiffs, dealers in foreign bills in New York, who presented the bill of exchange and obtained acceptance and, in due course, payment from the defendants' bank. It subsequently appeared that the bill of lading was a forgery and that no cotton had been shipped, and the defendants, (who had paid the amount of the bill to their bank), brought an action in New York against the plaintiffs to recover back the amount. The plaintiffs then brought an action in England, claiming declarations that they did not, by presenting the bill for acceptance with the bill of lading attached, warrant or represent that the bill of lading was genuine and that they were not bound to repay the amount of the bill. The English Court of Appeal held that the plaintiffs were entitled to the declarations claimed,

(*k*) Dicey, *op. cit.*, notes to his rule 172 (5th ed. 1932) 706.

(*l*) See § 4 of the present chapter, *infra*.

(*m*) [1918] 2 K.B. 623, C.A.: Pickford, Warrington and Scrutton L.JJ.; on appeal from [1918] 1 K.B. 43, Bailhache J.

affirming on this point the judgment of Bailhache J. In the New York action it had been held by the United States Circuit Court of Appeals that the case should be governed by English law (*n*). In the English action Bailhache J. held, upon the defendants' plea that the draft was conditional and therefore not a bill of exchange, that the question was, under s. 72(1) of the Bills of Exchange Act, governed by "American" law (that is, either Alabama law or New York law, which happened to be the same on this point), and that by that law the draft was conditional. The Court of Appeal, on this point, held that English law and American law were the same (the draft being unconditional by either law), and therefore it was unnecessary to decide by what law the question was to be governed. Pickford L.J. assumed, without deciding, that American law applied under s. 72(1), and referred to the possible application of proviso (b); Warrington L.J. decided the case without reference to the section; Scrutton L.J., having come to the conclusion that the draft was unconditional both by English and by American law, added: "This renders it unnecessary for me to express a final opinion on a point on which I feel great difficulty, the true meaning of s. 72, sub-ss. 1 and 2, of the Bills of Exchange Act [Canada, ss. 160 and 161], especially as to the exact extent of application of sub-s. 1(b). It would be curious if an American bill, differing (o) from the English form, were valid by English law for enforcing payment, and invalid in a suit to recover payment which had been made under it. And I have great doubts as to the true meaning of 'interpretation' in sub-s. 2, especially in view of the explanations of Sir M. D. Chalmers . . . and the comments thereon of Mr. Dicey. But as in my view the English and American laws are the same, the question need not be decided here." The question of "interpretation" under s. 72(2) will be discussed below (*p*). The comment of Scrutton L.J. on proviso (b) of s. 72(1) presumably relates to the opinion of Bailache J. that the expression "enforcing payment thereof" in proviso (b) does not include the obtaining of a declaration that the holder of a bill who has been paid is entitled to retain the money, and that as the action was brought by the plaintiffs for the purpose, not

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(*n*) *Hannay v. Guaranty Trust Co.* (1913), 210 Fed. Rep. 810.

(o) According to Dicey, *op. cit.*, p. 705, note (r), "differing" must be a misprint for "not differing."

(*p*) See § 3(b)(f) of the present chapter, *infra*.

of obtaining payment, but of preventing the defendants from getting the money back, the proviso did not apply.

It would appear from the foregoing that proviso (b) is not entirely satisfactory as it stands. Like proviso (a), it makes a partial and one-sided exception to the general rule. If it is not clear in its terms, or, if, though clear in its terms, it introduces illogical distinctions, its language should, it is submitted, be reconsidered by the legislature.

### § 3. Interpretation and Effect of Drawing, Acceptance and Endorsement.

#### (a) *The Bills of Exchange Act.*

In Canada it is provided by the Bills of Exchange Act, R.S.C. 1927, c. 16, s. 161, corresponding with s. 72(2) of the Bills of Exchange Act, 1882, as enacted in and for the United Kingdom:

161. Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance or acceptance *supra* protest of a bill, drawn in one country and negotiated, accepted or payable in another, is determined by the law of the place where such contract is made: Provided that where an inland bill is endorsed in a foreign country, the endorsement shall, as regards the payer, be interpreted according to the law of Canada.

Whereas s. 72(1) [Canada, s. 160] is comparatively free from ambiguity and is in substantial agreement with the rules of the conflict of laws relating to contract in general, s. 72(2) [Canada, s. 161] is more open to criticism, partly on account of its own ambiguity, partly because it is not so clearly in accord with the ordinary rules of the conflict of laws.

#### (b) *Meaning of "Interpretation."*

With regard to s. 72(2) [Canada, s. 161] itself, it is doubtful whether it is intended to include the intrinsic validity of the drawing, endorsement or acceptance or is confined to "interpretation" in the strict sense (q). If the latter construction is correct, the statute does not deal at all with the transfer of a bill except as to the form and interpretation, in the strict sense, of an endorsement, and the effect of an alleged transfer of a bill must be left to the ordinary rules of the conflict of laws. In view of this ambiguity (which alone, it may be suggested in passing, would seem to be sufficient ground for a

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(q) See also further discussion of the meaning of "interpretation" under heading (f) of the present § 3, *infra*.

reconsideration of the statute by the legislature), it is proposed to discuss the transfer of a bill separately and subsequently, and to limit the discussion for the moment to other phases of the subject of interpretation and effect.

As to interpretation, in the strict sense, that is, as to the construction or meaning of the words which the parties have used, there seems to be no reason for denying that the proper law is whatever law the parties intend to make applicable, and that only if the intention of the parties is not expressed or cannot be inferred from the terms and circumstances of the contract, resort can be had to any presumption in favour of the *lex loci celebrationis* or the *lex loci solutionis*, or as the case may be.

In the case of bills and notes it would, however, be undesirable from the point of view of subsequent holders that the question of the proper law should be a matter of conjecture, and an arbitrary statutory rule is preferable, unless indeed the proper law is designated on the face of the bill. The Bills of Exchange Act has made applicable to each contract on a bill the law of the place of making of the contract. Whether the statute ought to have made applicable the *lex loci solutionis* is another question.

A simple example of a question of interpretation in the strict sense is afforded by a bill expressed to be payable to C, without the use of the word "order," or a bill endorsed by the holder to D, without the use of the word "order." Under the Bills of Exchange Act (r) the bill and the endorsement are respectively payable to order, whereas in the United States under the Negotiable Instruments Act the bill itself is not negotiable, although in the case of the endorsement of a negotiable bill by the holder to D, without the use of the word "order," the bill is still negotiable. In any event, under s. 72(2) [Canada, s. 161], the interpretation of the bill as originally drawn is governed by the law of the place of drawing, and the interpretation of the endorsement is governed by the law of the place of endorsement.

### (c) *Intrinsic Validity or Effect.*

If we pass from interpretation in the strict sense to the intrinsic validity, or obligation, or legal effect, of a contract,

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(r) Sections 22 and 67 of the Canadian statute, corresponding with ss. 8 and 34 of the Bills of Exchange Act, 1882.

we reach a peculiarly controversial topic of the conflict of laws. The question as to what is the proper law is especially troublesome in cases of alleged illegality (*a*), to be discussed later (*b*).

Whether the proper law of a contract should be ascertained primarily by reference to the intention or presumed intention of the parties or upon substantial grounds which connect the contract with a particular country, it is plain that by English rules of the conflict of laws the place of making of the contract is not the sole criterion of the choice of the proper law (*c*). It is obvious therefore that s. 72(2) [Canada, s. 161] of the Bills of Exchange Act, if it is meant to cover the effect or obligation of a contract, ignores the prevailing doctrine as to the proper law of a contract, and arbitrarily and, subject to one proviso, absolutely, constitutes the *lex loci celebrationis* the proper law of each of the contracts on a bill. This departure from the general rule as to contract is justified, it is submitted, only if the statutory provision itself is unambiguous and satisfactory.

It is true that in the case of an ambulatory instrument such as a bill of exchange it is important and, from a practical point of view, almost necessary, that a subsequent taker should be entitled to rely upon some simple rule for ascertaining the proper law. He cannot always know where the contract of each prior party was made, but he can usually conjecture or ascertain the place of making more easily than he can inform himself of the intention of a prior party. But for this purpose it would be as convenient a rule, and one perhaps more nearly in accord with the ordinary rule of the conflict of laws to say that the *lex loci solutionis* should govern, in a case where a contract is made in one country and is to be performed in another. If, for example, a bill is accepted in one country and made payable in another, there is much to be said for the view that the obligation of the acceptor ought on principle to be governed by the *lex loci solutionis* rather than by the *lex loci*

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(*a*) Foote, *Private International Law* (5th ed. 1925) 397 ff., discusses separately the legality and the essentials of a contract. Dicey, *Conflict of Laws*, includes legality in "material or essential validity" (his rule 160), as distinguished from the effect of the terms of a contract (his rule 161). Westlake, *Private International Law*, §§ 212, 213, includes legality under the general heading "intrinsic validity and effects" of a contract.

(*b*) See § 5 of the present chapter, *infra*.

(*c*) See § 5(*a*) of the present chapter, *infra*, and chapter 16.

*celebrationis* (*d*), and the impression given by some authorities that the *lex loci celebrationis* is the governing law seems to be due to the fact that usually the place of acceptance is the same as the place of payment .

(d) *Story's Doctrine.*

At this point we are on the threshold of a maze of ambiguities, the contributing elements of which may be summarily stated as follows:

(a) Story was of opinion that the *lex loci solutionis* should govern the effect or obligation, as well as the interpretation, of a contract.

(b) His language is nevertheless supposed to have suggested the language of the statute which provides that the *lex loci celebrationis* shall govern "interpretation."

(c) Certain *obiter dicta*, approved by the draftsman of the statute, are in favour of the view that "interpretation" includes effect or obligation.

(d) The draftsman of the statute suggests that the statute may mean that the governing law is the *lex loci solutionis*.

The net result seems to be that the statute is to be construed as including something which in its natural sense it does not include, and, as this brings the statute into flagrant conflict with principle, it is then suggested that the statute should be brought into accord with principle by its being read as saying something quite contrary to its natural meaning. Incidentally, as we shall see, Story is charged with ambiguity by way of explanation of the wording of the statute, and his language is also used to support the suggestion that the statute may be construed in accordance with principle. The whole matter deserves some further examination, because it involves the question whether the statute in its present form serves any useful purpose.

The relevant passages from Story on the Conflict of Laws (*e*) are as follows:

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(d) Cf. Dicey, *Conflict of Laws* (5th ed. 1932) 708, citing *Rouquette v. Overmann* (1875) L.R. 10 Q.B. 525, 4 R.C. 287, 2 Ames 185; Westlake, *Private International Law*, § 229; but see Foote, *Private International Law* (5th ed. 1925) 458 ff., 464, distinguishing between the acceptor's "abstract liability to pay at all under his contract on the one hand, and the incidents, mode, and conditions of payment on the other."

(e) 8th ed., by Melville M. Bigelow, Boston (1883) 376-81.

§ 280. The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice; and the Roman law has adopted it as a maxim: 'Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit.' (f) . . . . (g).

§ 281. Paul Voet has laid down the same rule. . . . Everhardus adopts the same doctrine. . . . Huberus adopts the same exposition. . . . Indeed, it has the general consent of foreign jurists; although to this, as to most other doctrines, there are to be found exceptions in the opinions of some distinguished names. . . . The general rule has however been adopted both in England and America. In one of the earliest cases Lord Mansfield stated the doctrine with his usual clearness. 'The law of the place can never be the rule where the transaction is entered into with express view to the law of another country as the rule by which it is to be governed' (h). And this has uniformly been recognized as the correct exposition in the common law.

It has been questioned whether the rule stated by Story was really adopted by Roman law or had "the general consent of foreign jurists," and whether there was good authority for Lord Mansfield's dictum or for the cases in which that dictum had been followed in the United States when Story wrote his treatise in 1834 (i), but we are concerned for the moment only with Story's expression of his opinion, not with its accuracy.

The alleged ambiguity in Story's language begins only, if at all, when he discusses what he calls "cases of a mixed nature." Beginning with § 282 he reaffirms the general rule that the *lex loci solutionis* governs, if the specified place of payment is different from the place of contracting, but he discusses the difficulties in the application of the general rule in various cases. He begins § 291 with a reaffirmation of the general rule, as applied to the rate of interest, and then proceeds to a long discussion of cases of interest, damages or exchange, reaffirming the general rule in §§ 296, 309 and 310, and at last arrives at the subject of the rate of interest payable on a bill by parties who have become parties to it in different countries. His language on this subject is as follows:

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(f) Dig. 44, 7, 21.

(g) Except for the first sentence, the paragraph is reprinted in Story, *Bills of Exchange* (4th ed.) § 147.

(h) *Robinson v. Bland* (1760) 2 Burr. 1077, at p. 1078. As to this case, see § 5(c) of the present chapter, *infra*.

(i) See Lorenzen, *Conflict of Laws relating to Bills and Notes* (1919) 109 ff.; cf. 2 Beale, *Conflict of Laws* (1935) 1092 ff.

§ 314. Negotiable instruments often present questions of a like mixed nature. Thus suppose a negotiable bill of exchange is drawn in Massachusetts on England, and is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored; what damages will the holder be entitled to? The law as to damages in these States is different. In Massachusetts it is ten per cent., in New York and Pennsylvania twenty per cent., and in Maryland fifteen per cent. What rule then is to govern? The answer is that, in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn; and the successive indorsers are liable on the bill according to the law of the place of their indorsement, every indorsement being treated as a new and substantive contract. The consequence is, that the indorser may render himself liable, upon a dishonor of the bill, for a much higher rate of damages than he can recover from the drawer. But this results from his own voluntary contract; and not from any collision of rights arising from the nature of the original contract (*j*).

§ 315. It has sometimes been suggested that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity to the rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn; but only to guarantee its acceptance and payment in that place, by the drawee; and in default of such payment they agree upon due notice to reimburse the holder in principal and damages at the place where they respectively entered into the contract (*k*).

This explanation seems clear enough. As expressed in a case decided by the Supreme Court of Canada (*l*), relating to the measure of damages for breach of a contract for the sale of goods:

The relevant decisions are nearly all concerned with bills of exchange, and, as regards these, the effect of the decisions prior to the Bills of Exchange Act, appears to be that, by the law of England, interest by way of damages will be given according to the law of the place where the party charged has contracted to pay the bill; that is to say, according to the proper law of his contract (*m*). As a rule, the place of payment under each of the contracts embodied in the bill will be the place where the contracting party has become a party to the bill; and this accounts for the fact that the rule is sometimes stated as if the governing law, as regards interest, were the *lex loci contractus* (*n*).

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(*j*) Story, Conflict of Laws, § 314: reprinted as § 153, in Story, Bills of Exchange.

(*k*) Story, Conflict of Laws, § 315: reprinted as § 154 in Story, Bills of Exchange.

(*l*) *Livesley v. E. Clemens Horst Co.*, [1924] S.C.R. 605, at p. 609, [1925] 1 D.L.R. 159, at p. 162.

(*m*) *Cooper v. Earl of Waldegrave* (1840), 2 Beav. 282; *Allen v. Kemble* (1848), 6 Moo. P.C. 314; *Gibbs v. Fremont* (1853), 9 Exch. 25; *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522; *The Queen v. Grand Trunk Ry. Co.* (1890) 2 Can. Ex. C.R. 132; *Fergusson v. Fyffe* (1841), 8 Cl. & Fin. 121.

(*n*) As, for example, in *Gibbs v. Fremont* and *In re Commercial Bank of South Australia*.

It is fairly plain from Story's discussion that when the place of payment differs from the place of contracting (o) he thinks that as a general rule the former furnishes the proper law, in accordance with the presumed intention of the parties, and that it is only when the place of payment is the same as the place of contracting, or when there appears to be no conflict between the laws of these places respectively, that he sometimes speaks of the *lex loci contractus*, in the sense of the *lex loci celebrationis*, as being the governing law (p).

(e) *Chalmers' Doctrine.*

Dicey says (q), in explanation of the discrepancy between the statute and principle, that Story's expressions have apparently suggested the terms of s. 72(2) [Canada, s. 161], the statute reproducing the words rather than the meaning of Story. But Chalmers does not suggest that there has been any misunderstanding of Story in the drawing of the statute. On the contrary, he quotes Story as pointing out the reasons of the rule adopted in the statute (r). This is a matter of some moment, because the commentary of the draftsman of the statute is naturally regarded with especial respect (s), and his explanation is apt to lead to confusion in the construction of the statute. His quotation from Story, in explanation of the statute, is from Conflict of Laws, § 315 (Bills of Exchange, § 154), above quoted. But Story in this paragraph was merely explaining Conflict of Laws, § 314 (Bills of Exchange, § 153), which in turn related, not to the case of a contract made in one country and payable in another, but to the measure of damages applicable to parties contracting in different countries,

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(o) Cf. *Barbour v. Paradis* (1929), Q.R. 68 S.C. 31: a note made in New Hampshire by a resident of Quebec, without any indication of the place of payment, was held to be payable in Quebec; consequently the rate of interest was held to be governed by the law of Quebec. As to the law governing the rate of interest, see Johnson, Conflict of Laws (vol. 2, 1934) 301 ff.

(p) These remarks apply also to later paragraphs in Story; for example, Conflict of Laws, §§ 316a, 316b (Bills of Exchange, §§ 156, 157). The case of a bill not being stamped in accordance with the *lex loci celebrationis* is distinguished as involving formalities: Conflict of Laws, § 318 (Bills of Exchange, § 159). The question whether an acceptance is general or qualified (Conflict of Laws, § 333: Bills of Exchange, § 164) would appear to be a question of interpretation in the strict sense.

(q) Conflict of Laws (5th ed. 1932) 708.

(r) Chalmers, Bills of Exchange (9th ed. 1927) 282.

(s) "Almost authoritative" is Dicey's expression: *op. cit.*, p. 699.

the place of payment of each contract being assumed to be the same as the place of making. And on the next following page of his commentary, Chalmers says that, "it may be questioned whether the measure of damages comes within the meaning of the word 'interpretation' in its present context in the Act," and then proceeds to quote with approval a passage from Mayne on Damages (4th ed.) 234, and to cite again § 315 (§ 154) of Story for the proposition that the rule with respect to damages appears to be that "the place at which each party to a bill or note undertakes that *he himself* will pay it, determines with regard to him the *lex loci contractus* according to which his liability is governed."

Unless I have wholly misunderstood the learned draftsman of the Bills of Exchange Act, he seems to quote Story to explain a statute which says something quite different from what Story says, and, shortly afterwards, seems to say that the passage quoted from Story is irrelevant to the provision of the statute in question. But that is not all that, with respect, one feels bound to find fault with. Why, in order to say that the *lex loci solutionis* governs the measure of damages, choose for quotation a passage which artificially calls such law the *lex loci contractus*?—unless it is to give some additional countenance to the suggestion which is made by Chalmers in a passage intervening between the two references to Story, namely, that when the statute refers to "the law of the place where such contract is made" it means the law of the place where such contract is payable.

This is the language of Chalmers (*t*):

The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Probably the maxim, *contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*, would apply (*u*). But if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded: cf. Nouguié, § 1419.

The suggestion made in the first part of the passage quoted is startling. It would seem to contravene the rule for the construction of a code stated in *Bank of England v. Vagliano*

(*t*) Chalmers, *op. cit.*, 282-283.

(*u*) *Robinson v. Bland* (1760), 2 Burr. 1077 (bill accepted in France payable in England): cf. *Moulis v. Owen*, [1907] 1 K.B. 746, at pp. 754-5 (cheque drawn in France on bank in London).

*Bros. (v)*, and, if accepted, would seem to deprive the provision in question of its utility. A statute which has to be explained as meaning what it does not say is not of much use as a guide. The only authorities cited by Chalmers are a Latin phrase quoted by Story from the Digest, and two cases relating to intrinsic validity or legality, a subject which is apparently not governed at all by s. 72(2) [Canada s. 161](*w*).

It may also be questioned whether the suggestion made in the second part of the passage quoted from Chalmers is justified, namely, that when the statute refers to the law of the place where the contract is made, it means the rule of conflict of laws prevailing in that place and not the domestic law applicable to domestic transactions (*x*). The suggestion is superficially attractive, because it seems to afford another way of construing the *lex loci celebrationis* as meaning, by virtue of the doctrine of the *renvoi*, the *lex loci solutionis*. But the efficacy of this solution of the problem depends in each case upon the particular view of the doctrine of the *renvoi* adopted by the law of the place of contracting as interpreted by the court of the forum, and it is submitted that a statute which is supposed to furnish a guide as to the proper law in cases of conflict of laws relating to bills and notes should be construed as referring to the domestic law applicable according to its terms, and not as referring to the law which is to furnish the appropriate rule of the conflict of laws (*y*).

#### (f) "Interpretation" Again.

Chalmers approves (*a*) the view, expressed in some judicial dicta, that "interpretation" in s. 72(2) of the Bills of Ex-

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(*v*) [1891] A.C. 107, 3 R.C. 695.

(*w*) These cases are discussed in § 5(c) of the present chapter, *infra*.

(*x*) Dicey, Conflict of Laws (5th ed. 1932) 708, says that the term "law of the place" is certainly misleading if it means, as Chalmers in effect suggests, the law of the place, including its rules of the conflict of laws.

(*y*) See Lorenzen, Conflict of Laws relating to Bills and Notes (1919) 176; Gutteridge, Unification of the Rules of the Conflict of Laws relating to Negotiable Instruments (1934), 16 Jo. Comp. Leg. (3rd series) 56. The doctrine of the *renvoi* is discussed in chapters 7, 8, 9 and 10. At the end of § 5 of chapter 9, it is submitted that the case of a commercial contract is obviously not one of the exceptional cases in which the doctrine may be useful; see also chapter 16, § 2.

(*a*) Bills of Exchange (9th ed. 1927) 282.

change Act, 1882 [s. 161 of the Canadian statute] includes the obligations of the parties as deduced from such interpretation, or the "legal effect" of the contract (*b*). It is, however, this view which is chiefly responsible for the difficulty of reconciling the statute with principle, and which creates the temptation to construe the statute contrary to its natural meaning, and it is submitted that it would be simpler and more satisfactory to construe the statute as referring to "interpretation" in the strict sense, but as meaning what it says as regards interpretation in that sense. The statute would not then be so bad as far as it goes. The effect or obligation of each contract, including, apparently, the measure of damages on dishonour, as well as questions of legality or illegality, would all be left to be governed, independently of the statute, by the proper law of each contract, that is, usually by the *lex loci solutionis* of each contract. The result would be substantially, though not exactly, in accord with the solution proposed by the Geneva Convention of 1930, that is, that the obligations of the acceptor of a bill or the maker of a note are governed by the law of the place in which the instrument is payable, and that the effect of the signature of any other party is governed by the law of the place in which the signature is affixed (*c*). The substantial similarity of this solution with that afforded by English rules of conflict of laws depends, however, on two assumptions, namely, first, that the drawer or endorser undertakes to pay at the place at which he signs, and, second, that the place of signature is also the place at which he delivers the instrument (*d*).

As to s. 72(2) [Canada, s. 161], Chalmers (*e*) cites *Allen v.*

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(*b*) *E.g., Alcock v. Smith*, [1892] 1 Ch. 238, at p. 256; cf. *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, at pp. 683, 686; *Koechlin & Co. v. Kestenbaum Bros.*, [1927] 1 K.B. 889. Cheshire, *Private International Law* (2nd ed. 1938) 289: "Unfortunately, there is high judicial authority for the view that *interpretation* in the present section covers, not merely questions of construction, but also questions relating to the legal effect," etc.

(*c*) Cf. Gutteridge *op. cit.* (note (*y*), *supra*) 66 ff.

(*d*) The first assumption is reasonably safe, and underlies Story's statement, as already pointed out in the present § 3(*d*). The second assumption is more precarious, and if the place of signature were different from the place of delivery, the question of the place of making of the contract, already discussed in § 2(*b*) of the present chapter, *supra*, would arise.

(*e*) *Bills of Exchange* (9th ed. 1927) 281.

*Kemble (f)* and *Horne v. Rouquette (g)*. The judgments in the latter case do, it is true, contain passages which refer to the *lex loci celebrationis* of an endorsement as governing its interpretation, but the decision related to the necessity for or the sufficiency of notice of dishonour, and the case will be further discussed later in that connection (*h*). The case of *Allen v. Kemble* seems also to be inconclusive as to the application of the *lex loci celebrationis* of the drawing, acceptance or endorsement, and suggests rather that the *lex loci solutionis* should be the governing law, because the point was made in the judgment that if a bill is addressed by the drawer to the drawee at his place of residence in one country and is by the acceptance made payable in another country, this alteration in the place of payment does not affect the obligation either of the drawer or of any person who has endorsed the bill before the alteration was made (*i*).

Two Canadian cases decided under s. 161 are in point. In the Nova Scotia case of *Sanders v. St. Helens Smelting Co. (j)* a bill dated and drawn at Halifax, Nova Scotia, was addressed to a company at Manchester, England, and there accepted payable at a banker's in London. It was held that the interpretation of the acceptance was governed by English law, and that as so interpreted the acceptance was not qualified, but general. The decision seems to be right, the question being one of interpretation in the strict sense.

The Quebec case of *London & Brazilian Bank v. Maguire (k)* was decided on the ground that "interpretation" in s. 161 includes "legal effect." A bill was dated and drawn at Buenos Ayres; the drawer being the master of a bark, registered in New York and then bound from an Argentine port to New York, and the bill being given for an advance made by the plaintiff bank to enable the bark to proceed on her voyage; the bill being addressed to a firm in New York and being for "\$1,-

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(f) (1848), 6 Moo. P.C. 314.

(g) (1878), 3 Q.B.D. 514, at p. 520.

(h) See § 6 of the present chapter, *infra*.

(i) See Westlake, Private International Law, notes to § 230. *Allen v. Kemble* related to an alleged right of set-off: see § 10 of the present chapter.

(j) (1906), 39 N.S.R. 370.

(k) (1895), Q.R. 8 S.C. 358. See, however, Perrault, *Traité de Droit Commercial*, vol. 3 (1940) 1160 ff., supporting the view that "interpretation" should be construed in a narrow sense.

865, U.S. gold;" the payee being domiciled in Quebec, but the endorsement by him to the plaintiff bank being made in the Argentine Republic. In an action by the bank against the endorser, the plaintiff demurred to the defendant's plea. The plea in substance alleged that the defendant was mortgagee of the bark and, to the knowledge of the plaintiff, an accommodation endorser of the bill; and that under the law of the Argentine Republic the holder of the bill had a lien on the hull, freight and cargo of the bark prior to all claims except seamen's wages, and the failure diligently to collect the amount out of the hull, freight and cargo had the effect of depriving the defendant of any recourse against the bark and consequently discharged the defendant from liability on the bill. It was held that the liability of the endorser was governed by the law of the place where the endorsement took place, that is, by the law of the Argentine Republic, and not by the law of the place of payment or by the law of the endorser's domicile. The plaintiff's demurrer to the defendant's plea was therefore dismissed. The case might, however, have been decided in the same way, independently of the statute, on the ground that the proper law of the endorser's contract was that of the place where he undertook that he himself would pay, not that of the place where the acceptor undertook to pay (*l*), or alternatively, on the ground that it was a question of discharge of a party, rather than one of the obligation of the contract itself.

(g) *Single Law or Several Laws.*

The preceding discussion takes it for granted that in accordance with prevailing doctrine the different contracts on a bill are regarded for the purpose so far discussed as independent contracts, each governed by its own proper law, whether that law be, as a general rule, the *lex loci solutionis* or, as s. 161 provides so far as it is applicable at all, the *lex loci celebrationis*. In some respects, the opposing doctrine, namely that the whole bill, including all the supervening contracts, should be governed by a single law, is attractive and has obvious advantages (*m*).

(*l*) Cf. Story, Conflict of Laws, § 315 (Bills of Exchange, § 154), already quoted.

(*m*) For a discussion of both doctrines, with a summary of the laws of various countries, see Lorenzen, Conflict of Laws relating to Bills and Notes (1919) 121 ff.; cf. Gutteridge, Unification of the Rules of Conflict relating to Negotiable Instruments (1934), 16 Jo. Comp. Leg. (3rd series) 53, at pp. 67-68.

All authorities supporting the doctrine of the independence of the different contracts on a bill are forced to admit that there are some necessary limitations to the application of the doctrine (*n*). There is general agreement that the date of maturity of a bill should be determined by the *lex loci solutionis* of the bill, and it is so provided by s. 72(5) of the Bills of Exchange Act, 1882 [Canadian statute, s. 164] (*o*). There is not the same measure of agreement in different countries as to the law which should govern presentment for acceptance, presentment for payment, and the requisite proceedings on dishonour, but s. 72(3) of the Bills of Exchange Act, 1882 [Canadian statute, s. 162] (*p*) provides that "The duties of the holder . . . are determined by the law of the place where the act is done [is to be done?] or the bill is dishonoured." Westlake, indeed, goes a long way in the direction of approving the doctrine that the whole bill should be governed by a single law when he states in § 230 that: "Since the drawer or indorser of a bill . . . are sureties for the due performance of the obligation incurred by accepting . . . it, the law of the place where the bill . . . is payable according to the terms in which it is drawn . . . as regulating such due performance, indirectly affects their obligation by affecting that of the . . . acceptor." Whether he is right in adding that his proposition is probably not set aside by s. 72(2) [Canada, s. 161] may be questionable as applied to the proposition in its broadest sense.

On the other hand the proviso to s. 72(2) [Canada, s. 161]—"Provided that where an inland bill is endorsed in a foreign country, the endorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom" [Canada]—seems to suggest the theory that an inland bill should be governed to a certain extent by a single law, while it leaves foreign bills to be governed by the several laws proper to the respective contracts on the bill.

## § 4. Transfer of a Bill.

### (a) *Statement of the Problem.*

The transfer of a bill, note or cheque has been reserved for separate consideration for several reasons. If we suppose that

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(*n*) Lorenzen, *op. cit.*, pp. 128 ff.

(*o*) See § 8 of the present chapter, *infra*.

(*p*) See § 6 of the present chapter, *infra*.

an instrument is alleged to have been transferred abroad, the question arises whether the validity of the transfer is to be characterized as (1) a matter of the form of the endorsement, so as to fall within s. 72(1) of the Bills of Exchange Act, 1882 [Canadian statute, s. 160] (*a*), or (2) a matter of the interpretation (*b*) of the endorsement, so as to fall within s. 72(2) of the statute of 1882 [Canadian statute, s. 161] (*c*), or (3) a matter analogous to the transfer either of a movable thing or of a contract. At best the statute deals with the transfer of a bill in an ambiguous and unsatisfactory manner and has to be eked out by conjectural judicial construction, and some judges prefer to say that the subject is governed, apart from the statute, by the ordinary rules of the conflict of laws. It is again submitted that the provisions of the statute should be reconsidered by the legislature. If, as appears to be probable, the transfer of a bill is not governed by either s. 72(1) [s. 160] or s. 72(2) [s. 161], the question arises whether the subject is to be characterized (i) as being analogous to the transfer of a movable thing, or (ii) as being analogous to the transfer of a contract.

It is submitted that the simplest and most satisfactory solution of the question is to characterize the subject as analogous to the transfer of a movable thing and therefore to be governed by the *lex rei sitae* at the time of the transfer. The matter is primarily one of the transfer of the property in an obligation to pay money which is in effect merged in a tangible document, and the situs of the document (and consequently of the obligation) might well be regarded as the decisive factor (*d*). It is true that the document also embodies a contract or a series of contracts, which, if not incorporated in a negotiable instrument, might, as to its or their transfer, be governed by some law other than the *lex rei sitae*, but both practical and theoretical considerations would seem to preclude the possibility of applying one law to the transfer of the property in the instrument and another law to the transfer of the contract or contracts.

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(a) For the text of s. 160, see § 2(a) of the present chapter.

(b) As to "interpretation" in s. 161, see § 3(b) and § 3(f) of the present chapter, *supra*.

(c) For the text of s. 161, see § 3(a) of the present chapter.

(d) See chapter 20. As to the transfer of the property in a movable thing, see chapter 19.

(b) *Cases Before the Statute.*

Some of the leading cases decided in England before the passing of the Bills of Exchange Act, 1882, should first be noticed. In *De la Chaumette v. Bank of England* (e) it was held by the Court of King's Bench that a promissory note made in England payable to bearer was transferable by mere delivery in France. It was not, however, shown or found in that case that the law of France required more than delivery, though it was apparently assumed that it did so (f). The judgment of Littledale J. (g) was as follows: "The statute (h) makes promissory notes transferable in the same manner as inland bills of exchange; and it seems to me, therefore, that it makes them transferable in a foreign country in the same manner as inland bills undoubtedly are by the custom of merchants. It follows that, since the statute, a note made in England, assignable by delivery, will pass as currency abroad as well as here."

In *Trimbey v. Vignier* (i) a promissory note was made in France, where both maker and payee were domiciled, and was there endorsed in blank by the payee to the plaintiff. The maker was afterwards sued in England. Evidence was given as to the French law, and on this evidence it was found by the Court of Common Pleas that the plaintiff would not have been entitled to sue the defendant in France, it being provided by article 137 of the *Code de Commerce* that an endorsement must be dated, must express the consideration given, and must state the name of the endorsee, and by article 138 that an endorsement not in conformity with article 137 does not operate as a transfer of the instrument, but is merely a procuration (j). The court accordingly held that the plaintiff was not entitled to sue the defendant in England. Westlake (k) observes that it does not appear with certainty whether the French law was adopted on the ground of the place of endorsement or on

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(e) (1831), 2 B. & Ad. 385, 1 Ames 354.

(f) Foote, *Private International Law* (5th ed. 1925) 469.

(g) 2 B. & Ad., at p. 390; Lord Tenterden C.J., Parke J. and Patteson J. gave judgments to the same effect.

(h) (1704), 3 & 4 Anne, c. 9.

(i) (1834), 1 Bing. N.C. 151, at p. 160, 1 Ames 358.

(j) The French law has been amended, and Chalmers, *Bills of Exchange* (9th ed. 1927) liv, states that by the law of 8th February, 1922, full effect as a negotiation is now given to endorsements in blank.

(k) *Private International Law*, § 228.

that of the place of payment. What the court said, however, is that the French law in question governs and regulates "the interpretation of the contract" or "the contract itself," and does not relate merely to "the mode of suing," and that law, being the law of the country where the contract was made, should be followed by an English court; and it is submitted that the real doubt is whether the court, when it referred to the "contract," meant the contract of the maker or the endorsement of the note. In the case next to be noticed, it seems to have been regarded as clear that the court meant the maker's contract.

In *Lebel v. Tucker* (1) a bill was drawn, accepted and payable in England, and was therefore an inland bill. It was, in France, endorsed in blank to the plaintiff, who sued the acceptor in England. The Court of Queen's Bench held that the bill retained its English character, notwithstanding its endorsement in France, (just as conversely the note in *Trimbey v. Vignier*, retained its French character, notwithstanding its being sued on in England), and that the acceptor's contract was to pay to the payee or to any endorsee claiming under an endorsement valid by English law. *Trimbey v. Vignier* was expressly followed, and it seems clear that the principle adopted was that the validity of an endorsement is to be governed, not by the law of the place of the endorsement, but by the proper law of the acceptance, which was clearly English.

In *Bradlaugh v. De Rin* (m) a bill was drawn in Belgium upon the defendant in England and accepted by him in England. The bill was payable to the order of the drawer and was endorsed by him in Belgium and by three successive holders in France, the last endorsement, under which the plaintiff claimed, being in blank. In the Court of Common Pleas, Montague Smith J. held, following *Lebel v. Tucker*, that the plaintiff was entitled to succeed, the law governing the validity of the endorsement being the law of the place where the bill was accepted and payable, and not the law of the place of endorsement. Willes J., however, delivering the judgment of himself and Bovill C.J., held that the present case was distinguishable from *Lebel v. Tucker*, because there the bill was also drawn in Eng-

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(1) (1867), L.R. 3 Q.B. 77, 1 Ames 364.

(m) (1868), L.R. 3 C.P. 538, 1 Ames 371, Court of Common Pleas; reversed in the Exchequer Chamber (1870), L.R. 5 C.P. 473, 1 Ames 377.

land (*n*), and expressly followed *Trimbey v. Vignier*, in which the bill was both drawn and accepted in France. That is to say, Bovill C.J. and Willes J. laid stress on the place of drawing rather than the place of acceptance, "the bill being a French bill in its inception," and it is not easy to follow Westlake's observation (§ 228) that they decided on grounds which pointed to the place of endorsement (*o*). On appeal to the Court of Exchequer Chamber, the judgment of the Court of Common Pleas was reversed and a verdict directed to be entered for the plaintiff, on the ground that the evidence of the French law had been misunderstood in *Trimbey v. Vignier*, and that while the endorsement in blank was irregular under article 137 of the *Code de Commerce* and therefore did not operate as an absolute transfer of the bill, nevertheless under article 138 it operated as a procuration and conferred upon the endorsee the right to sue in his own name for the benefit of his immediate endorser and subject to all defences available against such endorser.

The case of *In re Marseilles Extension Railway & Land Co.* (*p*), though decided after the passing of the Bills of Exchange Act, 1882, related to bills drawn in 1866. Each of the seven bills in question was drawn in France, in English form but in the French language, payable in pounds sterling to the order of the drawer, a domiciled Frenchman, and addressed to an English company in London and accepted. The bills were endorsed in France by the drawer to a domiciled Englishman in a form valid by English law but not conforming with article 137 of the *Code de Commerce*, and by subsequent negotiation in England came into the hands of the applicants, who claimed to be creditors of the company in respect of the bills. The question was whether the applicants had such a title to the bills as enabled them to sue upon them in England. Pearson J. decided this question in favour of the applicants on the ground that the bills were intended to be English bills, or at least that the acceptor was not entitled to say that the bills were French, especial regard being had to the fact that the bills were drawn in a form valid by English law, but invalid by

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(*n*) In effect *Lebel v. Tucker*, was distinguished because there the bill was an inland bill.

(*o*) They did, it is true, mention the fact that the bill was endorsed in France.

(*p*) (1885) 30 Ch. D. 598, already cited in § 2(d) of the present chapter, *supra*.

French law. Pearson J. said: "If I had to decide the question as to whether or not where a bill is indorsed in different countries the indorsement must be in every case in conformity with the law of the country in which the indorsement takes place, I should certainly take time to consider before I came to the conclusion that that was the law." He also said that he was glad to be relieved from "a very serious difficulty, that of determining upon the decided cases in these courts, as well as upon the French law, what is the result of an indorsement (which is informal as regards the person who makes it) with regard to those who claim, not against that person, but who claim against the acceptors. To my mind there is exceeding difficulty in determining that the indorsement is to be valid for any purpose in this country, and yet that objection may be taken to it, and that the acceptor is at liberty to say, I am entitled in this country, although for some purposes the indorsement is treated as good, to take advantage of any equities that there may be between myself and the drawer of the bill as against an indorsee or holder for value who sues upon the acceptance. I am not bound, I am happy to say, to go into that question at all. I feel very strongly the observations of the late Mr. Justice Willes in the case of *Bradlaugh v. De Rin* (q), in which he points out that it is hardly possible to conceive a state of the law in this country in which there should be two persons able to sue at the same time on the same bill, one as the agent, and the other as the holder of the bill."

(c) *The Bills of Exchange Act.*

Notwithstanding the meagre and doubtful character of the support which the cases just stated give to the doctrine that the validity of an endorsement is governed by the *lex loci celebrationis* of the endorsement, Westlake, § 228, after making the observations already noted in connection with *Trimbey v. Vignier* and *Bradlaugh v. De Rin*, adds that the Bills of Exchange Act, 1882, s. 72 (1) [Canadian statute, s. 160] has decided the question of formalities in favour of the forms required by the *lex actus* of the endorsement, "which is in agreement with the usual principles of our subject and with the opinion of Story (*Conflict of Laws*, § 316a)." But, as already pointed out (a), Story's opinion is in accordance with his general view that usu-

(q) (1868), L.R. 3 C.P. 538, at p. 543, 1 Ames 371, at pp. 375-6.

(a) See § 3(d) of the present chapter, *supra*.

ally the proper law of a contract is the *lex loci solutionis*, the endorser's contract usually being that he himself will pay at the place where he endorses.

The Bills of Exchange Act enacts in effect (1) that, subject to two provisos, the formal validity of an endorsement is governed by the *lex loci celebrationis* of the endorsement (b), and (2) that, subject to one proviso and "to the provisions of this Act," the interpretation of the endorsement is likewise governed by the *lex loci celebrationis* of the endorsement (c).

As regards the cases decided before the passing of the Bills of Exchange Act (d) the rules as to the law governing the validity of an endorsement are, to say the least, doubtful; and, if we consider the provisos of the sections just referred to, it becomes increasingly difficult to regard the principal provisions of the sections as defining in a satisfactory manner the law which is to govern the validity of the transfer of a bill.

Proviso (a) of s. 72(1) of the Bills of Exchange Act, 1882 [Canadian statute, s. 160], relating to an unstamped bill issued abroad, has already been sufficiently discussed (e), and has no bearing upon the validity of a transfer. The anomalous situation resulting from proviso (b) of the same section has also been pointed out (f). It happens that this proviso precisely covers the case of *In re Marseilles Extension Railway & Land Co.* (g), if the defect in that case was one of form. Evidently Chalmers (h) thought it was a question of form, because he cites the case in connection with proviso (b). But the defect in the endorsement made in France in that case was exactly the same as the defect in the endorsement made in France in the case of *Lebel v. Tucker* (i), namely, failure to comply with article 137 of the *Code de Commerce*, and it is clear that the proviso of s. 72(2) [Canada, s. 161] was intended to be declaratory of

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(b) Can. s. 160; U.K. s. 72(1). See § 2 of the present chapter, *supra*.

(c) Can. s. 161; U.K. s. 72(2). See § 3 of the present chapter, *supra*.

(d) See the cases discussed in §§ 2 and 3, *supra*, as well as those already referred to in the present § 4.

(e) See § 2(d) of the present chapter, *supra*.

(f) See § 2(d) of the present chapter, *supra*.

(g) (1885), 30 Ch. D. 598; discussed both in § 2(d), *supra*, and in the present § 4.

(h) Bills of Exchange (9th ed. 1927) 280, notes to s. 72(1).

(i) (1867), L.R. 3 Q.B. 77, 1 Ames 364, already referred to in the present § 4, *supra*.

the law as decided in *Lebel v. Tucker*, which is cited by Chalmers (*j*) in connection with this proviso. As one section refers to form, and the other to interpretation, it would appear difficult to assign different meanings to "form" and "interpretation," as these words are used in the statute. We have also seen (*k*) that "interpretation" in the statute includes, according to one view, the "effect" or "obligation" of a contract, though, it is submitted, it would be simpler and more satisfactory to construe "interpretation" in the narrow sense.

Again, in the *Marseilles* case the bill was regarded as an English bill, but a similar bill would not now be within the definition of an inland bill (*l*), whereas in *Lebel v. Tucker*, the bill was also regarded as an English bill, and would now be within the definition of an inland bill. Even this difference between the two cases is perpetuated by the two provisos in question, the one under a section relating to form, and the other under a section relating to interpretation, so that the provisos have not even the merit of being based upon a common distinction between inland bills and foreign bills.

*Lebel v. Tucker*, when it was decided, seemed to confirm the supposed doctrine of *Trimbey v. Vignier*, that the proper law of the acceptance should, in the case of both inland and foreign bills, govern the validity of the endorsement, but it must, in view of the decision of the Court of Common Pleas in *Bradlaugh v. De Rin*, be regarded as laying down an exceptional rule applicable only to inland bills. Inland bills were therefore to be governed by the proper law of the acceptance, at least as regards the payer, whereas foreign bills were to be governed by the proper law of the drawing. Now, under the statute, the interpretation of the endorsement is in the exceptional case of an inland bill to be governed by the law of the place of drawing of the bill (which would usually also be the place of payment of the bill), whereas in the case of foreign bills the interpretation of the endorsement is to be governed by the law of the place of endorsement (which would usually also be the place of payment of the endorser's contract, but might be different from the place of payment of the bill).

It would appear therefore that the statutory provisions relating to the endorsement of a bill abroad are neither in ac-

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(*j*) *Op. cit.*, p. 281.

(*k*) See § 3(f) of the present chapter, *supra*.

(*l*) Byles, *Bills of Exchange* (20th ed. 1939) 317.

cordance with the earlier cases nor logical in themselves, and that even the words "form" and "interpretation" as applied to an endorsement are ambiguous. It is therefore not surprising that in the cases relating to the validity of endorsements made abroad decided since the passing of the statute the courts have had recourse to the statute only in a hesitating manner, and have manifested a tendency to resort rather to the general rules of the conflict of laws. Some of the cases are especially interesting because they relate to a contest between two mutually adverse claimants, and not merely to the question whether the payer is obliged to pay, or justified in paying, some person claiming under an endorsement made abroad.

(d) *The Lex Rei Sitæ.*

In *Alcock v. Smith* (m) a bill was drawn in England upon and accepted by English bankers payable on demand to merchants in Norway. It was specially endorsed in Norway by the payees and was subsequently endorsed in blank and delivered by the endorsee in Norway to an agent of the plaintiffs, who were entitled to the money as part of the consideration under a contract of sale. The bill was then taken from the agent by some process of execution under a judgment which had been previously obtained in Norway against one of the plaintiffs for his private debt, and was sold under that execution by public sale to a person who knew all the facts, but who afterwards sold the bill to a bank in Sweden, the bank knowing that the bill was overdue but being ignorant of any defect of title or adverse claim. The bill having been sent by the Swedish bank to a bank in England for collection, and the plaintiffs having brought an action in England against the acceptors, the Swedish bank and others, claiming the bill as their property and asking for an injunction to prevent the Swedish bank from collecting it, the acceptors paid the amount of the bill into court pursuant to an order of the court, and all the defendants were dismissed from the action except the Swedish bank. The case was thus reduced to a contest between the Swedish bank, claiming a title good by both Norwegian law and Swedish law, free from any equities, and the plaintiffs who contended that the overdue bill was, in accordance with English law, transferable only subject to the equities, and therefore subject to their right to receive payment. Romer J., the trial judge, held that the

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(m) [1892] 1 Ch. 238.

transfer of the bill, in accordance with the general rule of conflict of laws, was governed by the law of the place of transfer, this rule being expressed in s. 71(2) of the Bills of Exchange Act, 1882 [Canadian statute, s. 161], "interpretation" meaning "legal effect," and that the only exception to the rule in the case of bills was a case like *Lebel v. Tucker* which "has been made law, if it was not so before, by the proviso," namely, an exception "in favour of the rights and liabilities of the payer alone in the case of an inland bill indorsed in a foreign country." The action was therefore dismissed and the proceeds of the bill were ordered to be paid out to the Swedish bank. On appeal by the plaintiffs to the Court of Appeal, the judgment was affirmed. Lindley L.J. held simply that the endorsement of the bill in blank, interpreted either by English law or by the foreign law, was effectual, that there was no defect in the title of the person who negotiated the bill to the Swedish bank, he having got the bill by means that were lawful according to the law of the place where the transaction took place, and that the plaintiffs, though they had been the lawful holders, had ceased to be so by the foreign law and therefore by the law of England. Lopes L.J. concurred in substance with Lindley L.J. Kay L.J. relied chiefly on the rule of the conflict of laws that the validity of the transfer of personal chattels depends upon the law of the country in which the transfer takes place (a rule which, it is submitted, is stated more exactly by Dicey (n) thus: "An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*), wherever such assignment is made, is valid.") So far as the bill was to be regarded as a chattel, undoubtedly the property in it was vested in the Swedish bank, and Kay L.J. could see no reason why the bank, which by the law of Norway, recognized by English courts, had the sole right to the possession of the document, could not sue upon it, the document being payable to bearer by reason of its endorsement in blank. Even if the case had been a simple endorsement by a Norwegian holder of the overdue bill, the law of Norway would govern and by that law the endorsee would not take subject to the equities attaching to the bill. Kay L.J. then referred to the decision and a dictum in *Allen v. Kemble* (o) as being in favour of the

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(n) Conflict of Laws (5th ed. 1932), rule 152.

(o) (1848), 6 Moo. P.C. 314: see § 10 of the present chapter.

view that the foreign law should govern, and, finally, pointed out that even if the mere endorsement in Norway of an English overdue bill would not be free from equities, the sale in Norway under a judicial proceeding in which the plaintiffs were represented would be free from the equities. None of the judges of the Court of Appeal expressed any approval of the opinion of Romer J. that "interpretation" in the Bills of Exchange Act means "legal effect."

In *Embiricos v. Anglo-Austrian Bank* (p) a cheque on a bank in England was drawn in Roumania payable to the plaintiffs or order, and was endorsed by the payees to their correspondents in England for collection. The cheque was stolen and the endorsement of the plaintiffs' correspondents was forged, and the cheque was then presented at a bank in Austria and was cashed by that bank, which acted in good faith and without negligence. The Austrian bank endorsed and sent the cheque to the defendant bank in England, and the latter bank presented it to the drawee bank and obtained payment. The action was for conversion. According to Austrian law the Austrian bank had acquired a valid title to the cheque. Walton J., the trial judge, followed *Alcock v. Smith* as being a decision that the rule of conflict of laws that the *lex rei sitae* governs the transfer of a chattel is also applicable to the transfer of a negotiable instrument, and gave judgment for the defendant bank. He referred also to s. 72(2) of the Bills of Exchange Act, 1882 [Canadian statute, s. 161], without basing his judgment upon it, pointing out that if "interpretation" means "legal effect," the statute would cover the case, but that if the statute did not apply, the case was covered by the general law. On appeal by the plaintiffs to the Court of Appeal, the judgment was affirmed. All the judges agreed with Walton J. as to the effect of the decision in *Alcock v. Smith*. Vaughan Williams L.J. said that he was not satisfied that the provision of the Bills of Exchange Act was conclusive of the case; Romer L.J. said that the statute did not prevent the court from applying the general principles of the conflict of laws, but on the contrary recognized those general principles; and Stirling L.J. said that, as at present advised, and reserving to himself full liberty to reconsider the question if it should arise thereafter, he attached more weight to s. 72(2) than he understood that the other

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(p) [1905] 1 K.B. 677, 2 Brit. R.C. 294, affirming [1904] 2 K.B. 870.

members of the court did. It will be observed in what doubtful terms the judges refer to a statute which is supposed to furnish a guide in cases of the conflict of laws. The court having decided that the payee had no cause of action against the endorsee, Vaughan Williams L.J. pointed out that it would manifestly be an unsatisfactory state of the law if the legal result was that the endorsement was effective to give the endorsee a good title against the payee, but not effective to give that endorsee a good title against the drawer or the acceptor, and, after referring to some of the earlier cases, added: "At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognised by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract (q)."

The case of *Republica de Guatemala v. Nunez* (r) related to the assignment of a debt (s), not that of a negotiable instrument, but the judgments contain some observations relevant to the present subject.

In *Koechlin v. Kestenbaum Bros.* (t) a bill was drawn in France by E. Vigderhaus upon the defendants in England and there accepted by them payable at an English bank. The bill was payable to the order of M. Vigderhaus and was endorsed to the order of the plaintiffs by the drawer in his own name, he acting in fact on behalf and with the authority of the payee. The bill having been duly presented for payment, the defendants refused to pay and afterwards set up that the bill did not bear the endorsement of the payee. In an action by the endorsees against the acceptors evidence was given that by French law an endorsement may be validly made by a duly authorized agent signing his own name. There was no adverse

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(q) *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, at p. 684; cf. the observations upon this passage of Bankes L.J. in *Koechlin v. Kestenbaum Bros.*, [1927] 1 K.B. 889, at p. 897.

(r) [1927] 1 K.B. 669, C.A., affirming Greer J. (1926), 95 L.J.K.B. 955, 42 Times L.R. 625.

(s) As to the assignment of debts, see chapter 20.

(t) [1927] 1 K.B. 889, C.A., reversing Rowlatt J., [1927] 1 K.B. 616.

claimant. Rowlatt J. held that there was no endorsement by the payee which could under s. 72(1) [Canada, s. 160] be valid "as regards requisites in form" by French law, or which could under s. 72(2) [Canada, s. 161] be "interpreted" by French law, and he therefore dismissed the action. On appeal by the plaintiffs to the Court of Appeal, this judgment was reversed. Bankes L.J. held that the transfer of the bill to the plaintiffs was valid under s. 72(1), nothing being wrong with the bill except the form of the endorsement, and that in effect the statute had adopted the judgment of the majority of the Court of Common Pleas in *Bradlaugh v. De Rin (u)*. Alternatively, the transfer to the plaintiffs was valid on the ground stated in *Embiricos v. Anglo-Austrian Bank*, namely, by the application to the endorsement of a bill of the ordinary rule of the conflict of laws relating to the transfer of movable chattels. Sargant L.J. considered that the case was covered by the statute, which had adopted the decision in *Bradlaugh v. De Rin* and drawn a marked distinction between an inland bill, such as was dealt with in *Lebel v. Tucker*, and a foreign bill. The question was in his opinion purely a question of form within s. 72(1). He added that if the case was not within that provision, it was within s. 72(2) in view of the very wide effect of the decision in *Embiricos v. Anglo-Austrian Bank*, a decision which, he said, probably carried the matter further than was contemplated by the actual language of the section. Avory J. agreed that the appeal should be allowed. The case of *Koechlin v. Kestenbaum* is remarkable by reason of the fact that the judges relied so confidently upon the provisions of the Bills of Exchange Act, but it cannot be regarded as entirely satisfactory. It is only by a veritable *tour de force* that Sargant L.J. construed *Embiricos v. Anglo-Austrian Bank* as giving a meaning to the provisions of the Bills of Exchange Act sufficiently wide to cover the case of a forged endorsement. It seems clear that that case was decided independently of the provisions of the statute, and especially if one considers the range of the arguments as well as the terms of the judgments in *Alcock v. Smith* and *Embiricos v. Anglo-Austrian Bank*, one cannot help being struck by the almost casual way in which the court in *Koechlin v. Kestenbaum* swept aside all the difficulties in the way of regarding the statute as an unambiguous

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(u) A summary of this case is given, *supra*, in the present § 4.

and complete statement of the law based upon the cases decided before the passing of the statute.

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The foregoing review of the cases suggests some general supplementary observations. The transfer of a negotiable instrument is relatively simple in one respect, namely, in that any debt represented by the instrument is in effect merged in the instrument (*v*).

As regards the title to the instrument, which is itself a tangible thing, there would not appear to be any sufficient reason why the rule applicable to the transfer *inter vivos* of a chattel (*w*) should not be applied to the transfer of the instrument. The argument for the applicability of the *lex rei sitae* to the transfer of a negotiable instrument is indeed stronger than in the case of a chattel, because an essential part of the complete transfer (negotiation) of the instrument is the delivery of possession of the instrument to the transferee, so that the situs of the thing and the place of transfer are necessarily the same. It would appear therefore that a person is entitled as holder of the instrument so far as the links in the chain of title are valid by the *lex rei sitae* at the time of each prior transfer of the instrument, or, in other words, so far as the prior transfers are valid in accordance with the conflict rules of the forum, though not necessarily valid by the domestic rules of the forum (*x*).

Whether the holder is a holder in due course or entitled to take free from equities attaching to the instrument or defects of title of prior parties would appear to depend on the *lex rei sitae* at the time of the transfer to him (*y*).

The last holder (*z*), that is, the person who at the maturity of the instrument is the holder on the principles stated above, is, it is submitted, entitled to sue all prior parties liable on the instrument, provided that he fulfils the requirements of the law of the place of payment of the instrument as to presentment and protest, and as to notice of protest or notice of dishonour to the drawer of a bill or the endorser of a bill or note. If, however, a drawer or endorser is compelled to pay, and he seeks recourse

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(*v*) See p. 295, *supra*, and chapter 20, § 2(b).

(*w*) See chapter 19.

(*x*) Cf. the *Embiricos* case, *supra*, p. 305, *supra*, in which a transfer on a forged endorsement abroad was held to be valid in England, although the transfer was clearly invalid by domestic English law.

(*y*) See the *Alcock* case, *supra*, pp. 303 ff.

(*z*) As to this paragraph, see p. 320, *infra*.

against a prior party some law other than that of the place of payment of the instrument may be applicable.

## § 5. Legality, or Intrinsic Validity, of a Bill.

### (a) *The Proper Law of a Contract*

In § 3 of the present chapter the question as to what law governs the interpretation and effect of a bill or a contract on a bill, there discussed in the light of the ambiguous provisions of the Bills of Exchange Act, was simplified by the reservation for separate discussion, in § 4, of the transfer of a bill and, in the present § 5, of cases of alleged illegality.

As already pointed out (a), so far as s. 72 (2) of the Bills of Exchange Act, 1882 [Canadian statute, s. 161] extends, it makes applicable the law of the place of making of each contract on a bill. While this is a convenient rule and perhaps a desirable rule on a matter of "interpretation" (the only thing expressly covered by the statutory provision), it would, as regards intrinsic validity, be as convenient a rule, and one perhaps more nearly in accord with the general rules of the conflict of laws relating to contracts, to say that the governing law is the law of the place of performance. In connection with legality and intrinsic validity generally this seems to be an appropriate place to say something about the English theory with regard to the selection of the proper law of a contract. The theory was developed in cases in which the parties did not expressly select the proper law and in which therefore the intention of the parties was not itself an element in the selection but was merely an inference from the circumstances. The discussion here can be abbreviated because the subject is further discussed in another chapter (b).

The fashionable way of stating the English theory is that the proper law of a contract is the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed (c), and it must be admitted that this mode of expressing the doctrine of the proper

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(a) In § 3(b) and 3(c) of the present chapter, *supra*.

(b) See chapter 16, § 3, with particular reference to the question how far the parties' express selection of the proper law is effective.

(c) Dicey, *Conflict of Laws* (5th ed. 1932), rule 155. Dicey's rule is in effect much modified by the same author's explanation, quoted in chapter 16, § 3.

law finds some sanction in the words of Lord Mansfield (*d*) and in the language of judges of the highest courts in more recent times (*e*).

As to the relative importance of the place of making, the place of performance and other circumstances, for the purpose of ascertaining the proper law of a contract, a passage frequently quoted is the following (*f*):

It is, however, generally agreed that the law of the place where the contract is made, is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.

As regards interpretation or construction in a narrow sense there is no difficulty about giving effect to any express or implied intention of the parties, if it can be ascertained, even to the extent of incorporating in the contract the law of some country with which the contract has otherwise no connection; but (*g*) when we are looking for a law by which to test the intrinsic validity of a contract, to know whether it is legally binding or not, whether it is or is not effective according to its terms, it is only within narrow limits that we can admit the intention of the parties as the controlling element. We might let the parties choose between the laws of two countries each of which

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(*d*) *Robinson v. Bland* (1760), 2 Burr. 1077, 1 W. Bla. 234, 256. This case is also a leading English authority for the doctrine that if a contract made in one country is to be entirely performed in another country, its validity is governed by the law of the place of performance. The result, namely, to make English law applicable to a bill of exchange accepted in France, but payable in England, was reached more easily because the bill was itself in English form. The case is stated fully in the present § 5, *infra*, under heading (*c*) The Gaming Acts.

(*e*) See, for example, *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; *Spurrier v. LaClosche*, [1902] A.C. 446.

(*f*) *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, at p. 122, Willes J., delivering the judgment of the Court of Exchequer Chamber. Cf. *Jacobs, Marcus & Co. v. Crédit Lyonnais* (1884), 12 Q.B.D. 589.

(*g*) The rest of this paragraph must be read subject to the discussion in chapter 16, § 3.

has some real connection with the contract, but we cannot let them go far afield so as to make applicable the law of any foreign country which happens to be favourable to their views as to the conditions of a valid contract, and so as to substitute by a quasi-legislative act some foreign law for the law which otherwise ought to govern the contract.

Westlake (*h*) was, in his time, the outstanding critic of the theory that the intention of the parties is, or can logically be, a substantial guide in the selection of the proper law of a contract when the very question is whether that intention is lawful or whether the contract is legal and effective.

As regards illegality Salmond and Winfield (*i*) say:

A contract is illegal (*stricto sensu*) if it involves an illegal act, either in the making of it, or in the performance of it, or in the execution of the consideration for it, or in the fulfilment of the purpose with which it was made. Now, *prima facie*, a rule of English law prohibiting the doing of any act is limited in its application to the doing of that act in England itself. *Prima facie*, therefore, the only contracts which are void as being illegal in the making of them are contracts made in England, and the only contracts which are void as being illegal in the performance of them are those which are to be performed in England. So also with contracts involving the giving of an illegal consideration or the fulfilment of an illegal purpose. A contract made lawfully abroad, or intended to be lawfully performed abroad, is not void in England merely because it would have been illegal had it been made or performable there. An English statute which prohibits gaming, or the sale of liquor without a licence, does not invalidate a foreign contract made and performed abroad. . . . The *prima facie* rule of the limitation of illegality to acts done within the realm is capable, however, of exclusion. Penal and prohibitory statutes may expressly or by necessary implication possess an extra-territorial operation, and in such cases a contract which involved a breach of them would be void for illegality in England.

Different considerations apply to the scope of those rules of English law which invalidate contracts as being contrary to morality or to public policy. *Prima facie* the condemnation of a contract on the ground of immorality is intended to be universal in its territorial application, and is not limited to contracts made within the territorial jurisdiction of English courts. . . . Similarly, considerations of public policy are commonly of such a nature as to overpass mere territorial limits and to extend to contracts wherever made or to be performed.

The Bills of Exchange Act provides (*j*) that the title of a person who negotiates a bill is defective when he obtained

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(*h*) Private International Law, § 212, and the notes preceding and following that section; *cf.* chapter 16, § 3.

(*i*) Law of Contracts (1927) 537-539.

(*j*) Bills of Exchange Act, 1882, s. 29(2); Canadian statute, s. 56(2).

the bill "by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." These terms, with the exception of the Scottish expression "force and fear," are taken from the domestic English law of contracts, but presumably they can be construed as sufficient to include more or less analogous terms in other systems of law if the proper law of the contract is a foreign law, notwithstanding that the conflict of laws provisions of the statute make no mention of illegality or other similar grounds of defect in a previous title to a bill.

The consideration for a bill, that is, the consideration for a promise expressed or implied in the contract made by the drawer, acceptor or endorser of a bill, or the maker or endorser of a note, is defined by the Bills of Exchange Act (*k*) in terms which are taken from the domestic English law of contracts, without any reference to rules of the conflict of laws or to the possibility that under the proper law of the contract some other doctrine of consideration might be applicable. The question of sufficient consideration in English law, or of analogous requirements as to *causa* or *cause* in other systems of law, would appear to be a question of intrinsic validity governed by the proper law of the contract (*l*). To what extent the Bills of Exchange Act has introduced the English doctrine of consideration in the province of Quebec is not quite clear. If the consideration for a promise on a bill or note is sufficient by English law, it is sufficient in Quebec, but if it is not sufficient by English law, it may nevertheless be sufficient in Quebec if there is cause or consideration by Quebec law, and to this extent there may be room for the application of the proper law of the contract (*m*).

Where a note was made, in renewal of a previous note made without consideration, in favour of a bank in the state of Washington in order to create a false appearance of assets and deceive the bank examiner, the maker receiving contemporan-

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(*k*) The Bills of Exchange Act, 1882, s. 27; Canadian statute, s. 53.

(*l*) *In re Bonacina*, [1912] 2 Ch. 394; Dicey, Conflict of Laws (5th ed. 1932), notes to his rule 160, notwithstanding his strange suggestion, made in the notes to his rule 159, that consideration may be a question of "form."

(*m*) The subject is discussed by me in Banking and Bills of Exchange (5th ed. 1935) 651-654, and by Perrault, *Traité de Droit Commercial*, vol. 3 (1940) 283 ff., 329 ff.

ously from the bank a written acknowledgment that there would be no liability, it was held in an action in British Columbia, that, in accordance with the law of Washington, where the note was made and the liability, if any, incurred, the maker was estopped from pleading lack of consideration (*n*).

(b) *Public Policy.*

It seems desirable at this point to state some general principles relating to public policy in the conflict of laws, before reviewing the cases concerning bills and notes decided under the Gaming Acts.

In various circumstances a contract of which the proper law is English law, and which if it were performable in England would be unobjectionable by English law, may, by reason of the place of performance being wholly or partly a foreign country, be unenforceable or void by English law. If the object of the contract is to violate the law of a foreign country, the contract is void by English law (*o*); and when it is said that the contract is void as being contrary to public policy, this is only a mode of stating one branch of domestic English law as to illegality, and no question of the conflict of laws is involved (*p*). If an act of performance is illegal by the law of the stipulated place of performance at the stipulated time of performance, no action will lie in England for non-performance of that act (*q*), and, again, it is a question of domestic English law (*r*). If the act to be done is not illegal by the law of the stipulated place of performance, the effect of impossibility of performance at the stipulated place of performance depends in England upon domestic English law, and if the case falls within the principles governing excuse for non-performance

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(*n*) *Allen v. Hay* (1922), 64 Can. S.C.R. 76, 69 D.L.R. 193, [1922] 3 W.W.R. 366, 14 Brit. R.C. 649.

(*o*) *Foster v. Driscoll*, [1929] 1 K.B. 470. Quaere whether an exception exists if the law of the foreign country is a revenue law. *Ibid.*

(*p*) The case stated in the text is of course distinct from a case in which, by reason of a contract being performable in a foreign country, the proper law of the contract may be that of the foreign country.

(*q*) *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287.

(*r*) See chapter 15.

(*s*) See *Jacobs v. Crédit Lyonnais* (1848), 12 Q.B.D. 589, 1 R.C. 338, discussed in chapter 15.

by English law, no action will lie in England for non-performance (s).

A true question of public policy in the conflict of laws is involved when it is said that a court may be prevented from applying the proper foreign law by reason of the stringent public policy of the law of the forum. For example, a contract which is valid by its foreign proper law may be denied recognition or enforcement, not of course on the ground that it would be void if its proper law were the *lex fori* (t), but on the ground that it conflicts with "essential public or moral interests," or "essential principles of justice and morality" which exclude the application of the foreign proper law (u). This doctrine must be used with caution (v), because it tends to negative the use of all rules of the conflict of laws referring to any foreign law. The decision in *Kaufman v. Gerson* (w), that a promise made in France by a wife, in consideration of the promisee's refraining from instituting criminal proceedings against the promisor's husband in France, is unenforceable in England, would appear to be unjustifiable (x), although some of the hypothetical cases of extreme forms of duress mentioned in the judgments might be different. The case was not followed in *National Surety Co. v. Larsen* (y), in which many of the English cases relating to public policy in the conflict of laws are reviewed. In that case an action was brought in British Columbia on a covenant

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(t) A difference between the *lex fori* and the foreign law is not in itself a ground for declining to enforce the foreign contract. A right unknown to the *lex fori* may be enforceable. See, e.g., *Burchell v. Burchell* (1926), 58 O.L.R. 515, [1926] 2 D.L.R. 595.

(u) Cf. Westlake, *Private International Law*, § 215; Dicey, *Conflict of Laws* (5th ed. 1932) 25 ff., 882.

(v) Stumberg, *Conflict of Laws* (1937) 179: "The real difficulty with public policy as a limitation is that it is incapable of measurement. All law is an expression of policy and whether a particular foreign rule falls under the ban is a matter of opinion which can easily become a matter of whim. At the same time, it is something that must be reckoned with as a possible factor, though an exceptional one." See also, in addition to text books on the conflict of laws, Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924), 33 Yale L.J. 736, at pp. 746 ff.; The Public Policy Concept in the Conflict of Laws (1933), 33 Columbia L. Rev. 508; Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws* (1940), 49 Yale L.J. 1027.

(w) [1904] 1 K.B. 591, 4 Brit. R.C. 414.

(x) See, especially, the criticism of *Kaufman v. Gerson* in Dicey, *Conflict of Laws* (5th ed. 1932), appendix, note 3.

(y) (1929), 42 B.C.R. 1, [1929] 4 D.L.R. 918, [1929] 3 W.W.R. 299.

for payment contained in a mortgage on land situated in British Columbia. The defence was that the mortgage had been made to indemnify the plaintiff company against loss on a bail bond given by it in certain criminal proceedings pending in the state of Washington for the purpose of obtaining the interim release of the accused persons, the defendant's husband and son. In view of all the circumstances it was held that the proper law of the contract to indemnify the plaintiff and secure the indemnity by the mortgage was the law of Washington. From the domestic point of view the contract was valid by the law of Washington, but invalid by the law of British Columbia as being "contrary to public policy," and the question was whether the contract, though valid by its proper law, offended against some essential principles of justice or morality of the forum, that is, the public policy of the forum in the conflict of laws sense, so as to prevent the forum from giving effect to the proper law. The Court of Appeal reversed the judgment of the trial judge, who had dismissed the action.

(c) *The Gaming Acts.*

The early case of *Robinson v. Bland* (a) is of especial interest because it was one of the important authorities cited by Story in support of his doctrine that a contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance (b). The action was brought against the administratrix of Sir John Bland (1) upon a bill of exchange for £672 drawn in France by Sir John Bland upon himself in England and accepted by him, the consideration being £372 lost at play by the drawer to the plaintiff in France and £300 lent by the plaintiff to the drawer at the place and time of play; (2) for money lent and advanced by the plaintiff to Sir John Bland at his request; and (3) for money had and received by Sir John Bland to and for the use of the plaintiff. As to the money lent it was held by the Court of King's Bench that the plaintiff was entitled to succeed both by the law of England and by that of France. As

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(a) (1760), 2 Burr. 1077, 1 W. Bl. 234, 256. For an analysis and criticism of this case, see 2 Beale, *Conflict of Laws* (1935) 1092 ff. (not recognizing sufficiently, it is submitted, the importance of the place of performance as an element in the ascertainment of the proper law in English conflict of laws).

(b) Story, *Conflict of Laws*, §§ 280, 281, quoted in § 3(d) of the present chapter, *supra*.

to the money lost at play, Sir John Bland had died shortly after giving the bill, and was therefore beyond the jurisdiction of the "marshals of France," who might proceed personally "against gentlemen, as to points of honour, with a view to prevent duelling," and, in any event, as Lord Mansfield said, there "was no breach of honour in France: for the money was payable in England." It is stated in the report of the case that no action lay in any other court in France for the money lost at play; and in England no action lay for the money lost at play. As to the claim upon the bill of exchange the statute of 1710, 9 Anne, c. 14 (c), provided that all notes, bills, or other securities where the whole or any part of the consideration was money won by gaming or playing at cards, etc., or other game or games whatsoever, or money lent for gaming, etc., should be utterly void, so that the plaintiff was not entitled to succeed against the administratrix of Sir John Bland's estate by the law of England, nor, so the court held, could he recover by the law of France. The court, however, expressed the opinion that the law of England governed the claim upon the bill of exchange, and Lord Mansfield, according to one report (d), gave as one of his reasons: "1st. The parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. . . . Now here, the payment is to be in England: it is an English security, and so intended by the parties." According to another report (e), he said: "The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom. Huberus says, Prael. 1, tit. 3, p. 34, contracts are to be considered according to the place wherein they are to be executed. As therefore the bill in the present case is made payable in England, it is entirely an English transaction, and to be governed by the local law." It should be noted also that the bill was in English form.

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(c) Amended by the Gaming Act, 1835, 5 & 6 W. 4, c. 41, providing that the instrument should be deemed to be given for an illegal consideration, instead of being void.

(d) *Robinson v. Bland* (1760), 2 Burr. 1077, at p. 1078.

(e) *Robinson v. Bland* (1760), 1 W. Bla. 234, 256, at p. 258, 259.

The *lex loci solutionis* was also applied in *Story v. McKay* (f). There a bill was drawn in New York by the defendant, temporarily resident in New York though domiciled in Ontario, upon persons in Ontario, payable in Ontario to the plaintiffs, domiciled and carrying on business in New York. The drawees having refused to accept, the action was brought against the drawer in Ontario. The defence was that the bill was given "to cover margin or any possible loss" in connection with illegal gambling in the rise and fall of the price of wheat in the New York market, and that the bill was obtained by the plaintiffs "under pressure." It was held that the validity of the defence was to be decided by the law of New York, the drawer's contract being to reimburse the plaintiffs in New York in the event of non-acceptance or non-payment in Ontario by the drawees (g).

In *Moulis v. Owen* (h) the defendant gave to the plaintiff in Algiers a cheque drawn by him in English form on an English bank. The cheque was given, as to part, in payment of money lent by the plaintiff to the defendant to enable the defendant to play at baccarat in a club or gaming-house in Algiers, and, as to the balance, to be applied by the plaintiff in payment of money won from the defendant by divers persons in the same house. In an action in England upon the cheque, it was admitted that baccarat was not an illegal game in Algeria, and that the consideration for the cheque was legal according to the law of France. It was held by a majority of the Court of Appeal (Collins M.R. and Cozens-Hardy L.J.) that, in accordance with *Robinson v. Bland*, the transaction was governed by English law, that is, by the law of the place of payment of the cheque, and that under the Gaming Act, 1835 (i), the cheque must be deemed to be given for an illegal consideration, (that is, as regards the money lent by the plaintiff to the defendant for gaming), and that the action therefore failed. Fletcher

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(f) (1888), 15 O.R. 169, at p. 170. In *Cloyes v. Chapman* (1876), 27 U.C.C.P. 22, it was decided (wrongly, it is submitted) that a note payable in New York, and void on account of usury by New York law, was governed by Ontario law, and therefore valid, because it was held to have been made and endorsed in Ontario; cf. Johnson, *Conflict of Laws* (vol. 2, 1934) 302, note (3).

(g) Citing, *inter alia*, *Story*, *Conflict of Laws*, § 315.

(h) [1907] 1 K.B. 746, 4 Brit. R.C. 352.

(i) Cf. note (c), *supra*; In Ontario, R.S.O. 1937, c. 297, s. 1. For an account of the English Gaming Acts, and the corresponding legislation in Ontario, see my *More Anomalies in the Law of Wagering Contracts* (1931), 9 Can. Bar Rev. 331.

Moulton L.J., dissenting, held, upon a review of the Gaming Acts and the authorities, that the statutes were directed solely against acts done within the realm and had no application to acts done abroad (*j*). Alternatively, he thought that the pleadings should be amended so as to include a claim upon the consideration, as distinguished from the claim upon the cheque, and that upon the amended pleadings judgment should be given for the plaintiff.

In *Quarrier v. Colston* (*k*), decided in 1842 by Lord Lyndhurst sitting on appeal as Lord Chancellor, it was held that money won at play, or lent for the purpose of gaming, in a country where the games in question were not illegal, might be recovered in England. There was in that case nothing upon which to found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson v. Bland* and *Moulis v. Owen* from the fact that an English bill or English cheque was given, each of them being payable in England. So in *Saxby v. Fulton* (*l*) no bill or cheque was given, and it was held that an action might be successfully brought in England to recover money lent at Monte Carlo by the plaintiff for the purpose of being used in gaming by the testator, of whose estate the defendant was executrix, the game not being illegal by the law of Monte Carlo. Even if an English cheque is given for money lent in a country in which an action would lie for repayment, the lender may sue in England for repayment of the loan, although he is not entitled to sue on the cheque (*m*).

At the end of his judgment in *Moulis v. Owen* (*n*), Collins M.R. stated an alternative ground of justification for the decision in that case, namely, that by the joint operation of the

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(*j*) For approval of Fletcher Moulton L.J.'s view, see a note by Dicey, with Pollock's concurrence (1907), 23 L.Q. Rev. 249-251. For a criticism of *Robinson v. Bland* and *Moulis v. Owen*, see Cohen, On the Law of Securities Given Abroad for Gaming Debts (1912), 28 L.Q. Rev. 127.

(*k*) (1842), 1 Phillips 147.

(*l*) [1909] 2 K.B. 208, 4 Brit. R.C. 381.

(*m*) *Société Anonyme des Grands Etablissements du Touquet Paris-Plage v. Baumgart* (1927), 43 Times L.R. 278; 43 L.Q. Rev. 305 (1927). If money is lent for gaming in England, the lender is not entitled to recover either for repayment of the money lent or on a cheque given in repayment. *Carlton Hall Club v. Lawrence*, [1929] 2 K.B. 153. As to this case, see, however, a review by Diamond of Street, Law of Gaming (1938), 54 L.Q. Rev. 418.

(*n*) [1907] 1 K.B. 746, at p. 753.

Gaming Act, 1845 (o), and the Gaming Act, 1892 (p), the plaintiff was prevented from suing on the cheque. The statute of 1845 provided that all contracts or agreements by way of gaming or wagering should be null and void, and that no suit should be maintained for recovering any sum of money alleged to be won upon any wager; and the statute of 1892 provided that any promise to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, should be null and void, and that no action should be brought to recover any such sum of money. Consequently, in *Moulis v. Owen*, whether the consideration of the cheque was partly money won from the defendant or partly the undertaking by the plaintiff to pay money to the winners, reimbursing himself out of the cheque, the contract was rendered null and void by the statute of 1845, and, under the statute of 1892, no action could be brought to recover the money. The statute, it was said, would now be an answer to any action brought in England on one part of the claim in *Quarrier v. Colston*, and as the action in *Moulis v. Owen* was upon a cheque, the objection to part of the consideration was an answer to the entire claim; whereas, if the plaintiff in *Moulis v. Owen* had sued merely for repayment of the money lent to the defendant for gaming and not upon the cheque, he would have been entitled to succeed, the proper law of the contract being French law (q), and the case not being within the statutes of 1845 and 1892 (r). It is submitted, however, that if Collins M.R. meant that the mere use in a statute of the expression "no action shall be brought," or other similar expression, is equivalent to saying that the rule stated in the statute is a procedural rule of the law of the forum, applicable to an action in England even upon a contract which is valid by its proper foreign law, the proposition is unjustified (s).

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(o) Section 18; adopted in Ontario in 1912, and now appearing in R.S.O. 1937, c. 297, s. 4.

(p) Section 1; adopted in Ontario in 1912, and now appearing in R.S.O. 1937, c. 297, s. 5.

(q) *Saxby v. Fulton*, [1909] 2 K.B. 208, 4 Brit. R.C. 381.

(r) See a note by Dicey, approved by Pollock (1904), 20 L.Q. Rev. 436; cf. Salmond & Winfield, *Contracts* (1927) 164, 534.

In *Société des Hôtels Réunis v. Hawker* (t) the plaintiffs obtained from the defendant, an Englishman of 22 years of age, who had been staying at the plaintiffs' hotel in France, a cheque drawn on a bank in England, by a threat of criminal proceedings in France if it were not given, and a suggestion that no proceedings would be taken if the cheque were given. It was held that payment of the cheque would not be enforced in England (u).

### § 6. Presentment, Protest and Notice of Dishonour.

In Canada it is provided by the Bills of Exchange Act, R.S.C. 1927, c. 16, s. 162, corresponding with s. 72(3) of the Bills of Exchange Act, 1882, as enacted in and for the United Kingdom:

162. The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured.

This provision of the statute (a) is obscure in several respects (b), and Dicey (c) and Westlake (d) differ in their conjectures as to its meaning. Westlake remarks on "the strange wording by which parliament is made to say that the necessity of an act is to be determined by the law of the place where it is done, while it is just when an act has not been done that the question of its necessity arises," and he thinks that it is necessary to understand the words "or is not done" after the words "the act is done." Dicey would amend the phrase to read the "act is [to be] done." Dicey thinks that the words "act is done" refer to presentment for acceptance or payment, and that the words "the bill is dishonoured" refer to protest and notice of

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(s) As to the general proposition, see chapter 13. As to its applicability to other statutes, see chapter 4, § 8 (Statute of Frauds), and chapter 12 (Statutes of Limitation).

(t) (1913), 29 Times L.R. 578, affirmed, on a question of costs (1914), 30 Times L.R. 423.

(u) The court relying alternatively on *Mou'is v. Owen*, [1907] 1 K.B. 746, and *Kaufman v. Gerson*, [1904] 1 K.B. 591. As to the latter case, see § 5(b), *supra*.

(a) Cited in *Sparks v. Hamilton* (1920), 47 O.L.R. 55, applying the law of the specified place of payment of a note, as the law governing the duty to protest and the manner of presenting for payment. See also *Provincial Bank v. Bellefleur*, [1936] 1 D.L.R. 795.

(b) As *Cheshire*, Private International Law (2nd ed. 1938) 291, remarks, the section "verges perilously on the unintelligible."

(c) Conflict of Laws (5th ed. 1932) 710.

(d) Private International Law, §§ 231, 232.

dishonour. Westlake thinks that the words "act is done" refer only to protest.

The cases of *Cornelius v. Banque Franco-Serbe* (e) and *Bank Polski v. Mulder* (f) would seem to have afforded an opportunity for adequate discussion by the courts of the meaning of s. 72(3) [Canada, s. 162], but the conflict of laws aspects of the cases receive scant attention in the judgments (g).

Under whatever law a drawer or an endorser became a party to a bill, the duties to be performed by the last holder of the bill, in order to charge any other party, must be determined by the law of the place where the bill is payable. As Westlake (h) points out, a snare would be laid for the last holder, if he had to follow the directions of any other law with regard to what he had to do at the place of payment in order to preserve his recourse against previous parties. And the cases decided before the passing of the Bills of Exchange Act are in accordance with this principle (i).

It would appear to be obvious on principle that the necessity for or sufficiency of protest, as against all parties, must be determined by a single law, namely the law of the place where the bill is payable, but different considerations may apply to notice of dishonour given by some party other than the last holder. This latter question arose in *Horne v. Rouquette* (j). In that case the defendant endorsed in England a bill drawn in England and payable in Spain, and the plaintiff subsequently endorsed it in Spain, to one Monforte, who further endorsed it in Spain. The bill was presented by the holders for acceptance in Spain and was protested for non-acceptance. A delay of twelve days occurred before Monforte sent notice of dishonour to the plaintiff. Upon receipt of this notice, the plaintiff at once sent notice to the defendant. According to English law the defendant would not have been liable, but by the law of Spain no notice of dishonour by non-acceptance was required.

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(e) [1942] 1 K.B. 29, where the judgment is unduly abbreviated, as compared with the report in [1941] 2 All E.R. 728.

(f) [1942] 1 K.B. 497, C.A., affirming *Banku Polskiego v. Mulder*, [1941] 2 K.B. 266.

(g) See especially the interesting comment on both cases by Mann (1942), 5 Modern L. Rev. 251-256.

(h) Private International Law, comment following § 231.

(i) *Rothschild v. Currie* (1841), 1 Q.B. 43, 2 Ames 137; *Hirschfeld v. Smith* (1866), L.R. 1 C.P. 340, 2 Ames 178; *Horne v. Rouquette* (1878), 3 Q.B.D. 514.

(j) (1878), 3 Q.B.D. 514.

It was held that the plaintiff was entitled to recover. The decision might be regarded simply as a decision that the law of Spain applied because it was the *lex loci solutionis* of the bill, but all the judges of the Court of Appeal (Brett, Bramwell and Cotton L.JJ.) said that the plaintiff's liability to Monforte was to be determined by the law of the place of endorsement, that is, by the law of Spain, and the plaintiff being liable by that law to Monforte, the defendant was therefore liable to the plaintiff by the law of the place of the defendant's endorsement, that is, by the law of England. This doctrine, that the notice to be given, by an endorser who has been made duly liable, to each endorser (or to the drawer), depends on the law of the prior endorsement (or of the drawing), which is stated by Westlake in § 232, is in his view impossible to reconcile with the provision of the statute ("place where the act is done [or is not done]"), unless that provision is limited to the case of the last holder. Dicey dissents from this view.

The application of s. 162 is slightly complicated in Canada by the provisions of s. 114 (*k*). If an inland bill (s. 25) drawn upon any person in the province of Quebec or accepted in that province is dishonoured, protest would appear to be necessary, even though the bill is payable in another province and therefore according to the terms of s. 162 protest would not be necessary. A bill drawn within Canada upon some person resident in Quebec would also be an inland bill (s. 25), though payable in England, and would appear to be within the terms of s. 114, and protest would be necessary by the law of Canada. In England it would be a foreign bill, and protest would be also necessary by the law of England.

### § 7. Foreign Currency; Rate of Exchange.

In Canada it is provided by the Bills of Exchange Act, R.S.C. 1927, c. 16, s. 163, corresponding with s. 72(4) of the Bills of Exchange Act, 1882:

163. Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

The fact that the sum payable is expressed in a bill or note in foreign currency does not render the instrument non-nego-

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(*k*) Which provides that protest is necessary in the case of the dishonour of an inland bill drawn upon any person in the province of Quebec or payable or accepted at any place in that province.

tible, provided that the instrument does not say that it may or must be paid in any currency which is not legal tender at the place of payment.

In the case of a bill drawn out of but payable in Canada, the mode of calculating the amount payable in Canadian currency is prescribed by s. 163. In the converse case of a bill dishonoured abroad, s. 136 (1) provides for the recovery of the re-exchange and interest—the re-exchange being the amount of a sight bill drawn at the time and place of dishonour at the then rate of exchange on the place where the drawer or endorser sought to be charged resides, sufficient to realize at the place of dishonour the amount of the dishonoured bill and expenses consequent on its dishonour.

In *Syndic in Bankruptcy of Salim Nasrallah Khouri v. Khayat (m)* the principle of a provision corresponding with s. 72(4, of the Bills of Exchange Act, 1882 (Canadian statute, s. 163) was applied by analogy to a promissory note made in Palestine to pay in Palestine "two thousand gold Turkish pounds." It was held that the rate of exchange for the conversion from Turkish to Palestinian currency was that prevailing at the date of maturity of the note and not that prevailing at the time of any actual payment made subsequently (n).

### § 8. Due Date of a Bill.

In Canada it is provided by the Bills of Exchange Act, R.S.C. 1927, c. 16, s. 164, corresponding with s. 72(5) of the Bills of Exchange Act, 1882:

164. Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

While in some respects the several contracts on a bill may be governed by several laws, there is general agreement that the date of maturity of a bill must, as regards all parties, be governed by a single law, the *lex loci solutionis* of the bill (o), and s. 164 so provides.

(l) Cf. s. 57(2) of the Bills of Exchange Act, 1882.

(m) [1943] A.C. 507; cf. F.A.M. (1943) 59 L.Q. Rev. 303.

(n) Cf. the rule as to damages for breach of contract (*Di Ferdinando v. Simon*, [1920] 3 K.B. 409) and as to damages for tort (*S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544; *Denison* (1932), 10 Can. Bar Rev. 134.

(o) See § 3(g) of the present chapter, *supra*.

By English law days of grace are allowed on bills payable after date. By French law they are not. A bill drawn in Paris on London is entitled to three days' grace, but a bill drawn in London on Paris is not entitled to grace (*p*).

A bill is drawn in England payable in Paris three months after date. After the bill is drawn, but before it is due, a moratory law is passed in France, in consequence of war, postponing the maturity of all current bills for one month, and subsequently, from time to time, maturity is further postponed by similar moratory laws. The maturity of the bill is for all purposes to be determined by French law (*q*).

A bill is drawn in Ontario payable in Quebec three months after date. The last day of grace falls on All Saints' Day, which is a legal holiday or non-juridical day in Quebec, but not in Ontario. The bill is payable on the next following business day.

### § 9. Status and Capacity of Parties.

In an earlier chapter (*a*) stress has been laid on the importance in the conflict of laws of distinguishing between status and the incidents of status, and between status and capacity; and in a later chapter (*b*) the topic of capacity in the conflict of laws is itself subdivided so to speak, so that capacity for one purpose may be governed by one law, and capacity for another purpose may be governed by another law.

The specific subject for discussion in this place is the capacity of a person to make an "ordinary mercantile contract," in which case Dicey says that the law governing capacity is the law of the country where the contract is made (*c*). The Bills of Exchange Act provides that "capacity to incur liability as a party to a bill is co-extensive with capacity to contract" (*d*), and it would seem to be clear that the reference to the law of contract

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(*p*) *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525, at pp. 535-8, 4 R.C. 287, at pp. 296-9, 2 Ames 185.

(*q*) *Rouquette v. Overmann*, *supra*, applied in *In re Francke & Rasch* [1918] 1 Ch. 470.

(*a*) See chapter 4, § 8.

(*b*) See chapter 31, § 2. As to the power of an agent to bind his principal, see chapter 18.

(*c*) Conflict of Laws (5th ed. 1932), exception 1 to his rule 153; cf. Foote, *Private International Law* (5th ed. 1925) 100-104, 376-387; but see Westlake, *Private International Law*, § 2.

(*d*) Bills of Exchange Act, 1882, s. 22; Canadian statute, s. 47.

in general must be construed as a reference to the law of commercial contracts. The suggested rule that the law of the place of making of the contract (*e*) governs the capacity to make the contract would be equally appropriate to a contract upon a bill or note, and in the case of an ambulatory contract such as that upon a bill or note might be regarded as an especially convenient rule.

There is an extraordinary lack of modern authority in England as to capacity to make a commercial contract, but in *Male v. Roberts* (*f*) Lord Eldon held at *nisi prius* that the capacity to contract for the purchase of "liquors of different sorts" was governed by the law of the place of contracting, and this decision has not been overruled. The case was followed in *Saskatchewan* (*g*) in support of the conclusion that a promissory note made in Florida by a married woman domiciled in Saskatchewan, payable in Florida under contracts for the sale of land situated in Florida, was void in accordance with the law of Florida, although in Saskatchewan a married woman is capable of making a note. The conclusion in this case, as well as that in *Male v. Roberts*, might of course have been justified on the ground that the law of the place of contracting was also the proper law of the contract (*h*). On principle it would seem to be right to say that capacity to contract is a phase of the intrinsic validity of a contract and should therefore be governed by the proper law of the contract (*i*). It must be added, by way of caution, that if capacity to contract is governed by the proper law of the contract, the proper law must be the law of a country with which the contract has some substantial connection, and that a party cannot confer capacity upon himself by selecting as the proper law the law of a country with which the contract has no substantial connection (*j*).

In Quebec a person's status and capacity are governed by the *lex domicilii* (*k*); and the courts of Quebec make no distinction

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(*e*) As to the place of making, see § 2(b) of the present chapter, *supra*.

(*f*) (1800), 3 Esp. 163.

(*g*) *Bondholders Securities Corporation v. Manville*, [1933] 4 D.L.R. 699, [1933] 3 W.W.R. 1.

(*h*) As to the proper law of a contract, see § 5(a) of the present chapter, *supra*.

(*i*) Cf. Cheshire, *Private International Law* (2nd ed. 1938) 216-218.

(*j*) As to the power of the parties to select the proper law of a contract, and the limitations on that power, see chapter 16.

as regards capacity between mercantile and other contracts. Thus, although under Quebec law a minor engaged in trade is deemed to be of age for all the purposes of his trade, a minor domiciled in a country the law of which gives no recourse against such minor, cannot validly bind himself in that province in the course of his trade (*l*).

The Geneva Conventions of 1930 and 1931 provide, subject to some modifying clauses, that the capacity of a person to bind himself by a bill, note or cheque shall be determined by his national law—a solution which cannot be regarded as satisfactory from the point of view of Anglo-American countries (*m*).

### § 10. Set-off; Discharge of Obligation; Joint Obligation.

Some phases of the distinction between substance and procedure have already been discussed (*n*).

Set-off in English law is generally characterized as being, not a modification of an obligation, but an incident of its enforcement, and as being a matter of procedure governed by the domestic rules of the law of the forum (*o*). This view is consistent with the law of bills and notes, in which generally speaking a right of set-off is not a defect of title or an equity attaching to the instrument, and is not available as a defence against a transferee, but may be set up only between immediate parties (*p*). Exceptionally, however, a right of set-off might by express or implied agreement of the original parties be an equity attaching to the instrument (*q*) and consequently con-

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(*k*) Civil Code of Lower Canada, article 6; Johnson, *Conflict of Laws*, vol. 1 (1933) 180 ff.

(*l*) Lafleur, *Conflict of Laws* (1898) 147, citing *Jones v. Dickinson* (1895), Q.R. 7 S.C. 313; Johnson, *Conflict of Laws*, vol. 3 (1937) 143, 144.

(*m*) H. C. Gutteridge, *Unification of the Rules of Conflict relating to Negotiable Instruments* (1934), 16 Jo. Comp. Leg. (3rd series) 53, at p. 60. As to the Geneva Conventions, see § 12 of the present chapter, *infra*.

(*n*) See chapter 13, and (with particular reference to limitation of actions and prescription) chapter 12. As to form and procedure, see § 2(c) of the present chapter, and chapter 4, § 8.

(*o*) Westlake, *Private International Law*, § 346, and the notes to § 230; Foote, *Private International Law* (5th ed. 1925) 555; Dicey, *Conflict of Laws* (5th ed. 1932) 804, 849 ff. (rule 203).

(*p*) *In re Overend, Gurney & Co., Ex parte Swan* (1868), L.R. 6 Eq. 344, 4 R.C. 375.

(*q*) *Holmes v. Kidd* (1858), 3 H. & N. 891, 1 Ames 775; cf. Falconbridge, *Banking and Bills of Exchange* (5th ed. 1935) 704, 705.

stitute a modification of the obligation. So, in the case of any obligation governed by a foreign law, if that law in effect modifies the obligation, or provides for *compensation*, as distinguished from set-off in the English sense, it would be doubtful whether it would be justifiable to characterize the provision of the foreign law as procedural (*r*).

In *Allen v. Kemble* (*s*), B, resident in Demerara, drew a bill on A, resident in Scotland, payable to the order of C in England; A accepted the bill payable at a bank in England; C endorsed the bill to D, resident in Demerara, and D endorsed to E, resident in England. When the bill fell due, A was the holder of an overdue acceptance of E, who had in the meantime become bankrupt. In order to avoid the right of set-off which A would have against E's estate, the assignees of E, instead of suing A, sued B and D in Demerara. It was held that the obligations of B and D were governed by the law of Demerara, and that they, being sureties for the acceptor, were entitled to avail themselves of the rule of that law by which the acceptor would be discharged by compensation, or, in terms of English law, that they were entitled to the benefit of the set-off which the acceptor had against the holder. While in terms the judgment says that the obligations of the drawer and endorser were respectively governed by the *lex loci celebrationis*, the case is inconclusive, because the place of making of each of these contracts was also the place of payment, and the *lex loci solutionis* might well have been regarded as the governing law.

"The validity or invalidity of the discharge of a contract ought to depend upon the proper law of the contract. . . . On the whole, . . . we may fairly conclude 'that a contractual obligation, which has been extinguished by the law of that country which properly and substantially governs the obligation of the contract cannot be enforced here,' and that a contractual obligation which has not been so extinguished can be enforced [here]," (*t*).

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(*r*) Cf. 3 Beale, *Conflict of Laws* (1935) 1606; in Quebec, see articles 1187 ff. of the Civil Code of Lower Canada; cf. Nicholls, *The Legal Nature of Bank Deposits in the Province of Quebec* (1935), 13 Can. Bar Rev. at pp. 647 ff.

(*s*) (1848), 6 Moo. P.C. 314, stated and explained in *Rouquette v. Overmann* (1875), L.R. 10 Q.B. 525, at p. 541, 4 R.C. 287, at p. 302, 2 Ames 185, at p. 194.

(*t*) Dicey on *Conflict of Laws* (5th ed. 1932) 679-680; cf. Foote, *Private International Law* (5th ed. 1925) 482 ff. The question of discharge under bankruptcy legislation is subject to special considera-

So-called joint liability gives rise to difficult problems in characterization. In English law the distinction between joint liability and several liability might be regarded as being to a large extent procedural. In the case of a joint debt, each debtor is liable for the whole debt until the creditor is paid in full, but as there is only one debt the creditor can obtain only one judgment, and if he obtains judgment against one debtor, the other debtors are discharged. If the creditor sues one joint debtor, the latter may insist upon the other debtors being joined as defendants. In Quebec and French law, however, a debtor liable jointly (*conjointement*) is liable only for a proportionate part of the debt, so that the obligation is fundamentally different from that of one of several debtors. In the law of bills and notes in Canada the subject is peculiarly complicated by the fact that the Bills of Exchange Act (*u*), in terms of English law, draws the distinction between a joint note and a joint and several note. Hence arise problems both of legislative power and of the conflict of laws which require a longer discussion than is practicable here (*v*).

## § 11. Restatement of the Conflict of Laws.

For the sake of ready reference and comparison mention is made below of various sections of the Conflict of Laws Restatement promulgated by the American Law Institute on May 11, 1934. Some of the sections mentioned relate specifically to negotiable instruments and others are expressed in general terms sufficiently wide to include negotiable instruments.

Section 311, defining the "place of contracting" (*a*), is followed by special provisions relating to "formal contracts" (*b*), namely, § 312 (place of delivery is place of contracting), § 313 (delivery of renewal contract), § 314 (delivery by mail or carrier), § 315 (delivery by agent), § 316 (delivery in escrow), and § 320 (accommodation paper).

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tions, discussed by Dicey, *op. cit.*, pp. 503-510; 947-949; Foote, *op. cit.*, pp. 484 ff.; Westlake, *Private International Law*, §§ 240 ff.

(*u*) Canadian statute s. 179, in the same terms as s. 85 of the Bills of Exchange Act, 1882 [United Kingdom].

(*v*) For detailed discussion, see my article, *The Bills of Exchange Act in Quebec* (1942), 20 Can. Bar Rev. 723, at pp. 738 ff.; *cf.* § 1 of the present chapter, *supra*.

(*a*) See § 2(*b*) of the present chapter, *supra*.

(*b*) This expression includes negotiable instruments (Restatement of the Law of Contracts, § 7).

The law of the place of contracting governs the validity and effect of a promise, as regards mutual assent, consideration, time and place of performance, and the absolute or conditional character of the promise (§ 332), capacity (§ 333), formalities (§ 334), negotiability (§ 336), obligations of a mercantile instrument (§ 346), fraud, duress, illegality, mistake or other legal or equitable defence (§ 347).

The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise, in certain respects (§ 358), but, subject to § 358, the law of the place of contracting governs the nature and extent of the duty for the performance of which a party becomes bound (§ 332). The law of the place of performance governs the time when performance is due (§ 362), the postponement of performance by operation of law (§ 363), the medium of payment (§ 364), payment by bill or note (§ 365), breach (§ 370), right to damages and measure of damages (§§ 372, 413, 416), rate of interest (§ 418). The law of the place of payment of a bill or note governs the necessity and sufficiency of presentment for payment, demand, protest and notice of dishonor (§ 369). Damages for breach of a contract to deliver money not currency of the state where delivery is to be made are measured in currency of the state of performance at the rate of exchange current at the time of the breach (§ 423).

The validity and effect of a transfer of a negotiable instrument are governed by the law of the place where the instrument is at the time of its transfer (§ 349).

## § 12. The Geneva Convention, 1930.

The International Conference for the Unification of the Laws of Bills, Notes and Cheques, held at Geneva in 1930, adopted, not only a convention to which was annexed a uniform law of bills and notes (*c*), but also a separate convention for the settlement of certain conflicts of laws respecting bills and notes; and the Conference of the following year adopted a convention providing a uniform law of cheques, and a separate convention on the subject of conflicts of laws respecting cheques (*d*).

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(*c*) See my *Banking and Bills of Exchange* (5th ed. 1935) 491, 492.

(*d*) As to the conventions of 1930 and 1931 relating to the conflict of laws, see especially H. C. Gutteridge, *Unification of the Rules of*

Some of the provisions of the Geneva Convention of 1930 on the subject of conflict of laws have been mentioned in the earlier discussion, namely, those relating to the place of making (*e*), and obligation and effect of an instrument (*f*), and the capacity of parties (*g*). These and other provisions are quoted and commented on elsewhere (*h*).

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Conflict relating to Negotiable Instruments, 16 Jo. Comp. Leg. (3rd series) 53 (1934). As to the convention of 1930 relating to the conflict of laws, see also Bayalovitch, *l'Unification du Droit du Change*, and article by Hudson and Feller, *The International Unification of Laws concerning Bills of Exchange* (1931), 44 Harv. L. Rev. 332; P. Arminjon, *Journal du Droit International (Clunet)*, vol. 62, 1935, pp. 521 ff.

(*e*) See § 2(b) of the present chapter, *supra*.

(*f*) See § 3(f) of the present chapter, *supra*.

(*g*) See § 9 of the present chapter, *supra*.

(*h*) See Bayalovitch, *op. cit.*, at pp. 463 ff. (commentary on the convention of 1930, and comparison with the conflict of laws provisions of the Bills of Exchange Act; Hudson and Feller, 44 Harv. L.R. 333, at pp. 370-373 (brief summary); Gutteridge, *loc. cit.*, at pp. 59 ff. (text in English, and commentary on the conventions of 1930 and 1931; Balogh, *Critical Remarks on the Law of Bills of Exchange of the Geneva Convention* (1935), 9 Tulane L. Rev. 165, 10 *Ibid.* 36.

## CHAPTER XV.

### ILLEGALITY BY LAW OF PLACE OF PERFORMANCE\*

The case of *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit Bank* (a) suggests some critical observations directed less to the result reached than to the language of the learned judges of the Court of Appeal.

For the sake of brevity the defendants will be referred to as the "Hungarian company" and the "Hungarian bank" respectively (b). The plaintiffs, bankers carrying on business in London, accepted three bills of exchange drawn on them by the Hungarian company and payable in three months in London. The bills were sent to the plaintiffs on April 4, 1938, by the Hungarian bank together with a letter from the company undertaking to provide cover for the bills in London one day before maturity, and a guarantee by the bank. On the same day the bank wrote to the plaintiffs under separate cover drawing the attention of the plaintiffs to the fact that both the company and the bank would be in a position to provide cover at maturity only if the exchange regulations prevailing in Hungary at that date enabled them to do so. At that date legislation in Hungary made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. No consent was obtained for payment of the bills in question. Cover not having been provided at maturity, the plaintiffs brought an action in England against the Hungarian company and the Hungarian bank for payment of the amount of the bills and interest. It was held (1) that the letter sent by the bank under separate cover was not part of the contract and did not limit the clear promise contained in the undertaking and the guarantee; and (2) that the proper law of the contract was English law and that, since the contract

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\*This chapter reproduces a comment published (1939), 17 Canadian Bar Review 746-750.

(a) [1939] 2 K.B. 678.

(b) The facts and the conclusions are quoted, with some slight verbal changes, from the headnote in the *Law Reports*.

was to be performed in England, it was enforceable in an English court, even though its performance might involve a breach by the defendants of the law of Hungary.

The Court of Appeal, affirming the judgment of Branson J., held that the case did not fall within the principle stated by Lord Sankey L.C. in *de Béeche v. South American Stores (c)* and by Scrutton L.J. in *Ralli Brothers v. Compania Navera Sota y Aznar (d)*. In the former case Lord Sankey said: "It cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do." Scrutton L.J. said: "... where a contract requires an act to be done in a foreign country, it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country." The Court of Appeal in the *Kleinwort* case expressed a preference for Dicey's statement: "A contract . . . is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed." It may be that Lord Sankey's statement is too widely expressed, and that Scrutton L.J.'s statement is open to criticism in that it expresses as an "implied term" something which may not be consensual at all (*e*), and that Dicey's statement, so far as it is quoted above, is sufficiently accurate, and it would appear that the Court of Appeal is right in holding that the *Kleinwort* case does not fall within the principle stated in any of the passages quoted. A different question is whether Dicey's statement is right in its context, and whether any court is justified in approving of the statement in its context. For the purpose of the further discussion Dicey must be quoted in unabbreviated form, as follows (*f*):

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(c) [1935] A.C. 148, at p. 156.

(d) [1920] 2 K.B. 287, at p. 304.

(e) See especially *du Parc* L.J., [1939] 2 K.B. at pp. 697-698. Compare, as regards the theory of an implied term in frustration cases, the judgment of Goddard J. in *W. T. Tatem Ltd. v. Gamboa*, [1939] 1 K.B. 132, and comment (1938), 54 L.Q. Rev. 480. The criticism of Scrutton L.J.'s use of the expression "implied term" does not, however, affect the question of the conflict of laws discussed below.

(f) Dicey is quoted from the fifth edition (1932). In the first edition (1896) rule 148 was as follows: "The essential validity of a contract is (subject to the exceptions hereinafter mentioned) govern-

Rule 160.—The material or essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed by the proper law of the contract.

*Exception 3.*—A contract (whether lawful by its proper law or not) is, in general, invalid in so far as (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); . . . .

The foregoing is quoted *in extenso* by MacKinnon L.J. in the *Kleinwort* case (*g*), preceded by the words "The principle is stated with characteristic lucidity and precision in that great work, Dicey on Conflict of Laws", while du Parc L.J. contents himself with an abbreviated quotation, but adds a bit of reminiscence of the days when he had "the privilege of being taught by Professor Dicey". and of Dicey's insistence on the danger of rules being obscured by too much attention being paid to exceptions (*h*).

At a time when Dicey has been the subject of a good deal of extrajudicial criticism in England, it is interesting to note that two judges of the Court of Appeal have rather gone out of their way to assist in the process of elevating his *ipsissima dicta* almost to the height of "authority." His book on the Conflict of Laws has some great merits. Simplicity of statement is not, however, one of Dicey's merits. His effort to state exactly everything that has been decided or said by judges in cases old and new has tended to stereotype the doctrines of the conflict of laws in a series of rather complicated rules and exceptions, and there is a regrettable tendency on the part of judges to treat Dicey's propositions as a final statement, perfect in form and merely subject to be checked or modified here and there. This excessive judicial respect for the form of Dicey's "rules" tends to discourage any new investigation of the underlying principles of the conflict of laws and any consequent revision of the language of the rules in the light of new investigation.

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ed indirectly by the proper law of the contract." This rule appeared without change in the fourth edition (1927) as rule 160. Exception 3, so far as it is quoted here, has remained unchanged in all editions.

(*g*) [1939] 2 K.B. at p. 694. In the *Ralli* case [1920] 2 K.B. at p. 295, Warrington L.J. quotes the exception without abbreviation, as having been "accepted by both parties in the present case as an accurate statement of the law."

(*h*) [1939] 2 K.B. at p. 696. In its abbreviated form Dicey's "exception" is approved, without reference to the fact that it is an exception, by Lord Sterndale and Scrutton L.J. in the *Ralli* case, [1920] 2 K.B. at pp. 291, 300, and by Lord Wright in the Court of Appeal in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, at p. 519.

The rule now in question is an example of a case in which the approval by a court of the particular form of Dicey's statement commits the court to a particular theory of the relation between a conflict rule (a choice of law rule) and the proper law (a system of domestic rules of law selected in accordance with the conflict rule). Dicey's main rule 160 that the material validity of a contract is governed by the proper law of the contract would seem to be obvious, for it is difficult to imagine what law could govern the material validity of a contract except the proper law, and it is difficult to understand why so trite a rule should be solemnly approved by the Court of Appeal. It is clear, however, that according to Dicey's theory there may be another law, because he states, *by way of exception*, that the law of a foreign place of performance may render a contract invalid in England notwithstanding that the proper law of the contract is English law and by that law the contract is valid. This particular form of statement involves, it is submitted, a fundamental misstatement of the operation of the conflict rule in question. An accurate statement of the principle, it is submitted, would be that if by English conflict rules the proper law of a contract is English law, then domestic rules of English law are to be applied, and by one of those domestic rules the contract is invalid so far as the contract requires an act of performance to be done in a foreign country and by the law of that country the act is illegal. This mode of statement of the principle does not necessitate making any exception to the rule that the intrinsic or material validity of a contract is governed by the proper law of a contract, and is consistent with the results reached in the *Ralli* case and the *Kleinwort* case, and with the statements of Scrutton L.J. and Lord Sankey, quoted above, and with the reasoning of other judges, who approve of the text of Dicey's exception to rule 160 without approving of its being stated as an exception or without mentioning that it is so stated (*i*).

Put in other words my submission is that in the *Ralli* case and in the *Kleinwort* case, once it has been decided that the proper law of the contract is English law, the consequent application of domestic rules of English law does not involve any further question of the conflict of laws. The right result is reached by the application of domestic rules relating to illegality

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(i) As, for example, Lord Sterndale and Lord Wright, note (*h*), *supra*.

or impossibility of performance. Similarly if the proper law of a contract is English law and if the object of the contract is to violate the law of a foreign country, the contract is void in England by reason of a domestic rule of English law (*j*) and the use of the expression public policy in this connection is merely a mode of stating one of the kinds of contract which are illegal by domestic English law. Again, if the proper law of a contract is English law, and an act of performance is required by the contract to be done in a foreign country, and the doing of the act there is prevented by supervenient impossibility, the question of the validity of the contract in England is a matter to be decided by domestic rules of English law. This, it is submitted, is the true ground of the decision in *Jacobs v. Credit Lyonnais* (*k*). In that case it was held (1) that the proper law of the contract was English law, notwithstanding that some of the acts of performance, including the shipment of goods, were to be done in Algeria, and (2) that by English law an insurrection in Algeria which rendered shipment of the goods impossible did not afford an excuse for non-performance by the seller. Whether the decision was right or wrong on the second point (*l*) is immaterial for the present purpose. What is material is that the court discussed and applied, on the second point, domestic rules of English law, and that the case is therefore not authority for any supposed rule of English conflict of laws that mere impossibility of doing an act required by a contract to be done in a foreign country, as contrasted with the illegality of the doing of the act by the law of that country, does not afford an excuse for non performance (*m*).

(*j*) *Foster v. Driscoll*, [1929] 1 K.B. 470.

(*k*) (1884), 12 Q.B.D. 589, 1 R.C. 338.

(*l*) Although the case was approved by McCordie J. in *Blackburn Bobbin Co. v. Allen*, [1918] 1 K.B. 540, at p. 546, it is submitted that on the second point it was wrongly decided and is inconsistent with the *ratio decidendi* of the Court of Appeal in the *Blackburn* case, [1918] 2 K.B. 467.

(*m*) As to the views expressed in the foregoing paragraph, see also Cheshire, *Private International Law* (2nd ed. 1938) 277, note 5, with reference to a similar theory as to *Foster v. Driscoll* and the *Ralli* case stated by Mann (1937), 18 Brit. Y.B. Int. Law 107-113. The same point is mentioned in a comment on the *Kleinwort* case by Kahn-Freund (1939), 3 Modern L. Rev. 158, at pp. 160-161, under the heading *International Effect of Currency Restrictions*. In this comment and in Cohn, *Currency Restrictions and the Conflict of Laws* (1939), 55 L.Q. Rev. 552, at pp. 558-559, there are interesting observations on the merits of the *Kleinwort* case in connection with the wider question as to the effect to be given in England to the legislation of a foreign country imposing restrictions upon the liberty of its nationals to make payments outside of their country.

## CHAPTER XVI.

### BILLS OF LADING; PROPER LAW AND RENVOI\*

- § 1. Uniform bills of lading, p. 335.
- § 2. Conflict rules and domestic rules, p. 341.
- § 3. Proper law of the contract, p. 344.
- § 4. Exclusion of power to select proper law, p. 353.

The decision of the Privy Council in the case of *Vita Food Products Incorporated v. Unus Shipping Company Limited (In liquidation)* (a) is of great importance in various respects (b). In the present chapter particular stress will be laid on certain matters of the conflict of laws, including the doctrine of the *renvoi* and the question to what extent the parties to a contract are at liberty to select, by express declaration in the contract, the proper law which is to govern the intrinsic validity of the contract.

#### § 1. Uniform Bills of Lading.

Before the *Vita Food* case was decided it seemed that, by means of concurrent legislation in various countries, a substantial measure of success had been achieved in obtaining uniformity in the terms of bills of lading issued in connection with the

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\* §§ 1, 2 and 3 of this chapter reproduce an article bearing the same title published (1940), 18 Canadian Bar Review 77-96. § 4 reproduces a comment published (1941), 19 Canadian Bar Review 217-219.

(a) [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433, on appeal from the Supreme Court of Nova Scotia en Banc, (1938) 12 M.P.R. 513, [1938] 2 D.L.R. 372.

(b) The case had already been the subject of comment elsewhere, e.g., by Kahn-Freund (1939), 3 Modern L. Rev. 61; by Gutteridge (1939), 55 L.Q. Rev. 323; by McNair and Mocatta, editors of *Scrutiny, The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (14th ed. 1939), preface p. vi, and pp. 20, 470-471, 476, 479-480, 560, 569; and by Cook, 'Contracts' and the Conflict of Laws: 'Intention' of the Parties: Some Further Remarks (1939), 34 Illinois L. Rev. 423, reproduced in his *Logical and Legal Bases of the Conflict of Laws* (1942) 419 ff. See also Morris and Cheshire, *The Proper Law of a Contract* (1940), 56 L.Q. Rev. 320, and Morris, *The Choice of Law Clause in Statutes* (1946), 62 L.Q. Rev. 170, 176 ff.

carriage of goods by sea. The result of the decision in that case, however, appears to be that it is so easy for parties to contract themselves out of the legislative provisions that the substance of uniformity has given place to the shadow. In any event a brief account of the movement towards securing uniformity (c) will afford a useful introduction to the statement of the facts of the case. In the United States of America a federal statute, commonly known as the Harter Act, was passed in 1893 (d), and this statute was followed by the Australian Sea Carriage of Goods Act, 1904, the Canadian Water Carriage of Goods Act, 1910 (e) and the New Zealand Sea Carriage of Goods Act, 1922 (f). The movement towards uniform legislation was temporarily superseded, however, by a movement in favour of the preparation of a code of rules defining the rights and liabilities of a carrier of goods by sea which might be voluntarily incorporated in bills of lading (g) and at a meeting of the International Law Association held at the Hague a code of rules known as the Hague Rules, 1921, was approved (h). Ultimately the project for uniform legislation was revived and the Hague Rules were used as a basis, as explained in the recitals prefixed to the Carriage of Goods by Sea Act, 1924 (United Kingdom), as follows:

Whereas at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading:

And whereas at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference:

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(c) See Scrutton, *op. cit.*, pp. 468 ff., 560 ff., 569 ff.

(d) The text of the Harter Act was reprinted in appendix v to Scrutton, in several editions before the 14th (1939).

(e) Re-enacted in R.S.C. 1927, c. 207. The general scheme of the statute and the construction of certain sections are considered in *Paterson Steamships v. Canadian Co-operative Wheat Producers*, [1934] A.C. 538; cf. *Northumbrian Shipping Co. v. E. Timm & Co.*, [1939] A.C. 397.

(f) The text of these statutes is reprinted in appendix vi to Scrutton, *op. cit.* in several editions prior to the 14th (1939). The text of the New Zealand statute, still unrepealed, is also reprinted in appendix vi to the 14th edition.

(g) In the same way the York-Antwerp Rules of General Average, 1890, had been prepared with the view to their voluntary adoption.

(h) As to the Hague Rules, see the Report of the Thirtieth Conference of the International Law Association held at the Hague (1921), vol. 2, *passim*.

And whereas it is expedient that the said rules as so amended and as set out with modifications in the Schedule to this Act (in this Act referred to as "the Rules") should, subject to the provisions of this Act, be given the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading (i).

Among the similar statutes or ordinances passed in various parts of the British Empire are the Sea Carriage of Goods Act, 1924 (Australia), the Carriage of Goods by Sea Act, 1932 (Newfoundland), the Water Carriage of Goods Act, 1936 (Canada), and, in the mandated territory of Palestine, the Carriage of Goods by Sea Ordinance, 1926. Statutes for giving effect to the Hague Rules with modifications have been passed in Belgium and France, and in the United States the Harter Act has to a large extent been superseded by the Carriage of Goods by Sea Act, 1936 (j). Apart from some differences not material to the present discussion, the United States statute differs from a statute of the British type in at least two respects. The former incorporates the substance of the Hague Rules in the body of the statute, and applies to inward as well as outward bills of lading, whereas the latter sets out the Hague Rules in a schedule and purports to make them effective by a provision of the statute, subject to other specific provisions of the statute, and applies only to outward bills of lading.

The Newfoundland statute, in question in the *Vita Food* case, is an orthodox example of the British type. Sections 1 and 3 are as follows:

1. Subject to the provisions of this Act, the rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.

3. Every bill of lading or similar document of title issued in this Dominion which contains or is evidence of any contract to which the rules apply shall contain an express statement (k), that it is

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(i) See the Report of the Thirty-first Conference of the International Law Association at Buenos Aires (1922), vol. 2, *passim*, as to the further discussion of the Hague Rules, 1921, by that association, and by other bodies in 1922, including a summary of the proceedings of the International Maritime Conference held at Brussels in 1922.

(j) The text of the last mentioned statute is reprinted in appendix v to Scrutton, *op. cit.* (14th ed. 1929), and that of the Australian and Canadian statutes is reprinted in appendix vi. For the discussion in the Parliament of Canada prior to the enactment of the statute of 1936, see especially the Debates, House of Commons, 1936, volume 4, pp. 3212-3220; cf. Perrault, *Des Stipulations de Non-Responsabilité* (1939) 61-64.

(k) This "express statement" is commonly called the "clause paramount."

to have effect subject to the provisions of the said rules as expressed in this Act.

The Palestine ordinance, in question in the case of *The Torni* (1), departs from the foregoing type in that in the section corresponding with s. 3 of the Newfoundland statute these words are added: "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." As Scrutton L.J. pointed out in the *Torni* case (m), the Government of Palestine anticipated that people in Palestine might disobey the law by omitting the express statement that the bill of lading is to have effect subject to the provisions of the Rules, and endeavoured to give effect to the international convention by saying that even if in disobedience of the law this express statement were omitted, any bill of lading issued in Palestine should nevertheless be subject to the Rules. The Lord Justice added:

It has occurred to the parties here that they might upset the whole appletart—if I may use a conventional expression—of the countries who have agreed to the Rules, by simply putting in a clause into their bills of lading, as they have done: "This bill of lading wherever signed, is to be construed in accordance with English law." If that has the effect of striking out the whole of the Schedule, it will be quite simple for every shipowner to defeat the Convention and the whole system under it by simply putting in a clause: "This bill of lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going."

It will take very strong evidence to convince me that such a clause has that meaning. I read the effect of the Palestine Ordinance as this: in every bill of lading, whether stated or not, these terms of the Schedule, the Hague Rules, are to be included as part of the terms. Consequently, when I come to construe this bill of lading, I read into it those terms. I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: "Yes, here is the bill of lading with those terms in it. Now construe it according to English law."

The other judges of the Court of Appeal expressed their views in less colloquial language, but they agreed that the express terms of the Ordinance, based on an international convention, could not be defeated by the insertion of a clause in the bills of lading that they were to be construed according to English law, and that the bills of lading were subject to the provisions of the Ordinance and the Rules, and, with those terms read into them, should then be construed according to English law.

It is interesting to note that the author of Scrutton on *Charterparties and Bills of Lading* continued, notwithstanding

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(1) [1932] P. 78, C.A.

(m) [1932] P. 78, at p. 83.

his appointment to the bench, to take part in the preparation of new editions until and including the eleventh edition (1923). In the preface to that edition the Lord Justice manifested a critical, if not hostile, attitude to the proposed legislation in the United Kingdom as being an unjustified interference with freedom of contract, and to some of the provisions of the Rules as being ambiguous or unsatisfactory. Nevertheless, when the legislation had become a *fait accompli*, Scrutton L.J. in his judicial character manifested in the *Torni* case his unwillingness to permit parties to frustrate the purpose of the international convention and the consequent legislation by attempting to contract themselves out of the statutory provisions. From this point of view it would seem to be unfortunate that the Privy Council has now encouraged parties to contract themselves out of the statutory provisions, not only by holding that the parties had succeeded in doing so on the facts of the *Vita Food* case, but also by disapproving of the reasoning of the Court of Appeal in the *Torni* case, notwithstanding that the *Torni* case might have been distinguished on the facts (n).

In the *Vita Food* case, pursuant to a contract of sale between one Basha and the plaintiff company, Basha in Newfoundland shipped, for delivery to the plaintiff in New York, three lots of herrings in the *Hurry On*, a ship owned by the defendant company and registered at Halifax, Nova Scotia. Through the captain's negligence in navigation the *Hurry On* ran ashore in Nova Scotia. The herrings were there unloaded, reconditioned and forwarded in another ship, and were delivered in New York in damaged condition, and an action for damages was brought in Nova Scotia by the consignee against the shipowner.

There were three bills of lading issued in respect of the goods shipped, identical except as regards the description of the goods, and they may conveniently be referred to as a single bill of lading. Although the shipment took place and the bill of lading was issued in 1935, by error or inadvertence an old form was used, containing no reference to the Newfoundland Carriage of Goods by Sea Act, 1932, or to the Rules set out in the schedule to the statute. In other words the clause paramount which was

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(n) Firstly, because of the additional words occurring in the ordinance in question in the *Torni* case, and, secondly, because the parties in that case merely said that the contract was to be construed by English law, whereas in the *Vita Food* case they said that the contract was to be governed by English law.

required by the statute to be inserted in the bill of lading was omitted. The bill of lading also provided that in case of shipments from the United States the Harter Act should apply, and that save as so provided the bill of lading should be subject to the terms and provisions of and exemptions from liability contained in the Canadian Water Carriage of Goods Act, 1910 (o), which was thus incorporated *pro tanto* in the bill of lading so as to become applicable to shipments from Newfoundland notwithstanding that by its terms the statute applied only to shipments from Canada. The bill of lading also provided that "This contract shall be governed by English law."

The plaintiff contended that the effect of the omission of the clause paramount was to render the bill of lading void for illegality so as to deprive the defendant of the benefit of the exemption from liability not only under the contractual provisions of the bill of lading (including the incorporated provisions of the Canadian Water Carriage of Goods Act, 1910) but also under the statutory provisions of the Newfoundland Carriage of Goods by Sea Act, 1932, and thus to subject the defendant to the liabilities of a common carrier. The Privy Council, having held that the bill of lading was not void for illegality either in Newfoundland or in Nova Scotia, might reasonably have held that it was subject to the Carriage of Goods by Sea Act, 1932, notwithstanding the omission of the clause paramount, so as to give the protection of the statutory provisions (p), instead of the contractual provisions, but on the contrary the Privy Council held that the defendant had successfully contracted itself out of the statutory provisions and was protected by the contractual provisions. It would seem to be regrettable that the Privy Council has without apparent necessity seriously impaired the efficacy of the effort made in various parts of the British Empire to give effect to an international convention, but presumably, if the partial wrecking of the convention resulting from the reasoning of the Privy Council is regarded as a real grievance by persons engaged in the shipping and carriage of goods by sea, the damage can be repaired by the necessarily slow process of uniform amending legislation.

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(o) Which, as already noted, was afterwards superseded by the Water Carriage of Goods Act, 1936.

(p) Cf. *The Torni*, note (l), *supra*.

## § 2. Conflict Rules and Domestic Rules.

Of perhaps greater gravity, because even less easily remediable, is the confusion which is likely to result from Lord Wright's mode of statement of certain alleged principles of the conflict of laws. The following critical observations are submitted with all due respect to the views of a judge who in several departments of the law, by the authority of his name and the persuasive character of his writings, has given notable encouragement to movements towards the reform and improvement of the law (*a*).

In the *Vita Food* case Lord Wright says (*b*):

It will be convenient at this point to determine what is the proper law of the contract. In their Lordships' opinion the express words of the bill of lading must receive effect with the result that the contract is governed by English law. It is now well settled that by English law (and the law of Nova Scotia is the same) the proper law of the contract "is the law which the parties intended to apply."

Postponing the discussion of this alleged rule of the conflict of laws with regard to the selection of the proper law of a contract, and assuming for the moment its accuracy, I venture to lay stress on the fact that the rule in question is a conflict rule and not a domestic rule (*c*). The application of this English conflict rule is of course not a consequence of the selection of English law as the proper law of the contract, but, on the contrary, the validity of the parties' selection of English law as the proper law, so far as it is valid, is a consequence of the application of the English conflict rule. Furthermore English

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(*a*) Lord Wright has been indefatigable in his efforts to encourage in England the adoption of a new approach to the general problem of remedies for unjust enrichment, with the view of broadening the scope of these remedies and liberating them from the limitations of old procedure and forms of action: see, *e.g.*, his review of the Restatement of the Law of Restitution (1937), 51 Harv. L. Rev. 369, and his address entitled *Sinclair v. Brougham* (1938), 6 Cambridge L.J. 305. As regards the law of contract he has, in his review of Williston (1939), 55 L.Q. Rev. 189, manifested a willingness to look beyond the text of English judgments and avail himself of what has been written outside of England. He is chairman of the [English] Law Revision Committee appointed by the Lord Chancellor. See also Lord Wright, *Legal Essays and Addresses* (1939), containing his extra-judicial writings: reviewed by C.A.W. (1940), 18 Can. Bar Rev. 71.

(*b*) [1939] A.C. 277, at pp. 289-290, [1939] 2 D.L.R. 1, at pp. 7-8, [1939] 1 W.W.R. 433, at p. 440.

(*c*) For the sake of brevity a "rule of the conflict of laws" will be referred to in the subsequent discussion as a "conflict rule", as contrasted with a "domestic rule" or "domestic law" (frequently referred to as a "local", "internal", "territorial" or "municipal" rule or law).

law thus selected as the proper law should mean domestic English law, unless we deprive the proposition of all meaning by saying that English conflict rules apply because English conflict rules say so. The forum being in Nova Scotia the conflict rules of Nova Scotia are of course applicable to the case, and the reason why English conflict rules apply is that English and Nova Scotia conflict rules are identical. In accordance with what has just been stated, Lord Wright on the next following page of the report distinguishes between the proper law of the contract, which fixes "the interpretation and construction of the express terms of the contract" and supplies "the relevant background of statutory or implied terms," and "that part of the English law, which is commonly called the conflict of laws" and which "requires where proper the application of foreign law." His language in the passage quoted above, is, however, susceptible of the construction that English law which is to be applied as the proper law of the contract is itself part of English rules of the conflict of laws (*d*), and though this does not seem to be the natural meaning of the language used, that meaning alone is consistent with the following passage in which Lord Wright states his conclusion (*e*):

There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence *English rules relating to the conflict of laws* (*f*) must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Act.

The reference in this passage to English conflict rules is perhaps due to a *lapsus calami* on Lord Wright's part, because the conclusion seems to bring us back in a circle to the starting point. The appeal being from a court of Nova Scotia, it would seem that the Privy Council must apply the conflict rules of Nova Scotia. As regards the topic of contract these rules may be assumed to be identical with English con-

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(*d*) Incidentally, it is submitted that *Jacobs v. Credit Lyonnais* (1884), 12 Q.B.D. 589, and *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, cited by Lord Wright as examples of the application of English conflict rules are really examples of the application of domestic English law resulting from the selection of English law as the proper law of the contract. Another somewhat analogous example of the application of domestic English law in its character as the proper law of the contract is *Foster v. Driscoll*, [1929] 1 K.B. 470. For a fuller statement of my submission, see chapter 15,

(*e*) [1939] A.C. 277, at p. 292, [1939] 2 D.L.R. 1, at p. 9, [1939] 1 W.W.R. 433, at p. 442.

(*f*) *Italics mine.*

flict rules. Therefore English conflict rules are to be applied. In order to give any distinct meaning to the selection of English law as the proper law of the contract, it would seem that the English law selected in accordance with the conflict rules of Nova Scotia or England must be domestic English law.

Another disquieting possibility is that Lord Wright intends to express his approval of the doctrine of the *renvoi* as universally applicable, that is, in the sense that a reference by a conflict rule of X to the law of Y always means a reference to the conflict rules of Y. It is hard to believe, however, that without mentioning the doctrine or discussing any of its implications and difficulties, he intends to break new ground by holding that the doctrine applies to the case of every commercial contract of which the proper law is a foreign law (that is, a law other than that of the forum). The English cases in which the doctrine has hitherto received some kind of recognition have been decisions of single judges proceeding on different lines of reasoning, and usually have been cases relating to the meaning of the "law of the domicile" in an English conflict rule (most of them being cases relating to the question of the formal validity of a will of movables) or have been exceptional cases in which the *renvoi* may be justifiable (*g*), and it would be preferable to believe that the Privy Council has not intended to ignore all that has been previously written on a difficult problem and casually and categorically to state a solution for all cases in which the problem may arise.

If I might without undue presumption attempt to compose a paraphrase of what Lord Wright might properly have said in the conclusion stated in the passage last quoted above, and on the assumption that he was accurate in saying that the proper law of the contract was English law (*h*), I might suggest something like the following:

Hence, in accordance with the conflict rules of Nova Scotia (which are identical for the present purpose with English conflict rules) domestic English law must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Newfoundland statute. Domestic English law means the law which an English court would apply to a hypothetical domestic English situation, that is, in the present case, to an outward bill of lading issued in England, and domestic English law includes "the background of statutory or implied terms" existing in that situation.

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(*g*) Cf. chapter 9, for reference to some of the more recent writing pro and con.

(*h*) The question of the selection of the proper law will be considered in § 3, *infra*.

Consistently, as it seems to me, with the foregoing reconstructed conclusion respecting the proper law of the contract, Lord Wright then discusses a different question, namely, whether the bill of lading issued in Newfoundland in contravention of the Newfoundland statute was wholly void for illegality because its issue was prohibited by Newfoundland law (as distinguished from the question whether by its proper law some of its provisions were invalid in view of the statutory or other provisions of the proper law) so that it not only would be declared void by a court in Newfoundland if its validity was in issue there, but also should be declared void by a court of Nova Scotia in accordance with the conflict rules of Nova Scotia without regard to the proper law of the contract. On this point Lord Wright reaches the conclusion that the bill of lading was not illegal by Newfoundland law or by the conflict rules of the law of Nova Scotia. This conclusion was of course independent of any question of the proper law of the contract, and indeed it would not seem that the result of the judgment depended in any respect on Lord Wright's finding that English law was the proper law of the contract.

### § 3. Proper Law of the Contract.

There remains for discussion the question how far the parties to a contract are at liberty to select, by express declaration in the contract, the proper law that is to govern the intrinsic validity of the contract. Lord Wright has undoubtedly brought into the full light of day a question which has always been lurking in the background of all discussion of the selection of the proper law of a contract in the conflict of laws, but it is another question whether he has stated a good working rule or has merely added more fuel to the fire of controversy.

Most of the discussion in the past has related to the question to what extent the presumed intention of the parties is the controlling element in the selection of the proper law in a case in which the parties have not clearly, or not at all, expressed their intention. On this question, which ultimately involves the question as to the effect of an express declaration of the parties, there is less substantial difference between the views of certain authors than would *prima facie* appear from the extreme diversity of their modes of expression.

According to Westlake (a) "it may probably be said with

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(a) Private International Law, § 212; see also the author's observations preceding and following that section.

truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection . . . ."

The author deliberately retained this statement in successive editions of his book without importing into it the intention of the parties, on the ground that "even where the supposed intention has been nominally relied on, it has been in fact nothing more than a fictitious intention presumed from following the doctrine" above quoted, "and has been in itself no substantial guide to the choice of law." Referring to *Jacobs v. Crédit Lyonnais* (b) and *In re Missouri Steamship Company* (c) as cases decided "on substantial considerations," he added: "But it must be admitted that in both cases a stress was laid by the learned judges on the intention of the parties, as the governing element in the choice of a law, which is not in accordance with the discussion preceding [§ 212], and which, where the lawfulness of the intention is itself in question, as it was in *In re Missouri Steamship Company*, I still find it difficult to reconcile with the logical order to be followed."

In the text of his "rules" Dicey (d) states in its extreme form the doctrine that the proper law of a contract, governing its intrinsic or material validity, is "the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed," and that "when the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption" (e). The main doctrine is, however, stated to be subject to important exceptions (f), and the effect to be given to either the expressed or the presumed intention of the parties, is explained (g) in a way which deprives the intention doctrine of a good deal of its meaning. The author tells us that what is meant is that the proper law is the law

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(b) (1884), 12 Q.B.D. 589.

(c) (1889), 42 Ch. D. 321.

(d) Conflict of Laws (5th ed. 1932), rules 155, 160 and 161.

(e) Dicey, *op. cit.* sub-rule 1 of rule 161.

(f) Dicey, *op. cit.*, rule 160. With particular reference to "exception 3" to rule 160, see chapter 15.

(g) Dicey, *op. cit.*, notes to rule 161, sub-rule 1, and, in the appendix, note 22: What is the law determining the material validity of a contract.

with reference to which the parties "really intended" to contract, notwithstanding that in order to give validity to a contract invalid by that law the parties may "assert their intention to contract with reference to another law" (*h*). The author in another place (*i*) calls this real intention the "*bona fide* intention", and in effect explains that this intention must be to contract with reference to the law of a country with which the transaction is really connected. The author uses the word "absurd" twice in some passages which are worth quoting in full, because they seem to be a statement of the essence of the author's theory, and because they contain some interesting examples (*j*):

The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its material validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, nor can they defeat this rule by agreeing that Scottish law shall govern their agreement. The same objection is sometimes put in another shape. X and A enter in England into a contract to be performed partly in England and partly in another country, *e.g.*, Mauritius. It is valid by the law of England, but invalid by the law of Mauritius. Is the contract to be held valid or not? If you look to the intention of the parties, you are bound to presume that they meant to contract with reference to the law which makes the contract valid. Hence, where there is a question between two possible laws under one of which a contract is, and under the other of which a contract is not, valid, the contract must always be held valid. But this result is absurd. . . . What is contended for is that the *bona fide* intention of the parties is the main element in determining what is the law under which they contract. . . . No doubt, in deciding this matter, the court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its material validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, *e.g.*, the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the court their real intention was to enter into an English contract.

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(*h*) Dicey, *op. cit.*, notes to rule 161, sub-rule 1; 4th ed. 1927, p. 628, footnote (v), 5th ed. 1932, p. 668, footnote (g).

(*i*) Dicey, *op. cit.*, appendix, note 22.

(*j*) Dicey, *op. cit.*, appendix, note 22. The passages are quoted here as they appear in the 5th edition (1932), pp. 964-965, slightly varied from corresponding passages of the 3rd edition (1922) by Dicey and Keith and the 4th edition (1927) by Keith.

Dicey's statement of the relation of the intention of the parties to the selection of the proper law is rendered obscure by his effort to reconcile the fashionable judicial mode of expression with what are or ought to be the results reached in various circumstances. The proper law of a contract in its natural sense means of course the law which for any reason is the governing law (*k*), but, as Dicey begins, in deference to the judicial mode of expression, by defining the proper law as the law intended or presumed to be intended by the parties, he is obliged partially to explain away his definition in those cases in which for any reason the governing law is some other law, and in effect the factual intention, if any, of the parties gives place in those cases to a fictitious intention.

Cheshire (*l*), after quoting a few out of the many available judicial dicta which attribute predominant importance to the factor of intention, says:

The first impression produced by these passages is that so great deference is paid to intention that the choice of the governing law is left to the caprice of the parties. This is not so. It is too crude, and it is not correct, to describe the proper law as being that system of law which the parties intended to make applicable. Otherwise it would be possible, for instance, for two Englishmen, when making a contract in London to be performed wholly in England, to stipulate that it should be subject as regards essentials to the law of Russia. It would also be possible for the parties to exclude some inconvenient rule of the legal system that would normally govern essentials. An attempt to do this was made in *The Torni* (*m*).

The same author states his own theory as follows:

The proper law does not depend upon the intention of the parties *per se*. It may be more accurately described as the system of law with reference to which the contract has in fact been made, or, as Westlake puts it, the system with which the transaction has the closest and most real connexion (*n*).

A contract which impinges upon two or more legal systems must be more intimately associated with one particular system than with the other or others. The system with which this association exists

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(*k*) As is pointed out by Salmond & Winfield, *Law of Contracts* (1927) 530.

(*l*) *Private International Law* (2nd ed. 1938) 251-252.

(*m*) [1932] P. 78. As pointed out earlier in the present chapter, the Privy Council, unnecessarily refusing to distinguish the *Torni* case, has in the *Vita Food* case said in effect that the attempt of the parties to evade the law of Palestine ought to have succeeded in the earlier case.

(*n*) Cheshire, *op. cit.* 354. With perhaps greater nicety of expression, Westlake speaks of the connection between the transaction and a country, not between the transaction and a system of law. See the passage quoted from Westlake, note (*a*), *supra*.

is ascertained by an examination of the circumstances of each individual case (o).

If the circumstances establishing a connexion with two or more countries are so evenly balanced that the predominant legal system is not obvious, then an explicit expression of intention by the parties may turn the scale and produce a definite decision. Provided that a contract by its very nature possesses already some reasonable connexion with a legal system, there is no objection to the connexion being made final and definite by the parties themselves. . . . What is not true is the assumption that the parties can subject a contract to some legal system with which it has no internal connexion (p).

Beale (q) considers that rules which in various forms and with various limitations allow the parties to choose the law which is to govern the obligation of their contract are open to both theoretical and practical objections. The fundamental objection in point of theory is, in his view, that any rule of this kind involves permission to the parties to do a legislative act. "So extraordinary a power in the hands of any two individuals is absolutely anomalous; so much so that even the courts which adopt a rule of this sort have been occupied in defining limitations to the exercise of the parties' will. Thus it is almost universally provided that the parties cannot exercise the power unless they do so in good faith."

Lorenzen (r) says:

So far as it applies to the validity of contracts the intention theory does not admit of a theoretic defence. The validity or invalidity of a legal transaction should result from fixed rules of law which are binding upon the parties. Allowing the parties to choose their law in this regard involves a delegation of sovereign power to private individuals. Dicey's explanation of the intention theory does not meet this objection. If the parties to a contract which is made in England and is to be performed in France can, by the mere operation of their will, make it a French contract or an English contract, which is subject, as regards intrinsic validity, to French or English law, respectively, they are in fact determining the validity of the contract, and to that extent exercising sovereign powers. This is true though they may be restricted in their choice to the law of the states with which the contract has a substantial connection.

Goodrich (s) observes that the rule that the validity of a contract is determined by the law intended by the parties "bristles with difficulties, theoretical and practical", but ac-

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(o) Cheshire, *op. cit.* 254-255.

(p) Cheshire, *op. cit.*, 256.

(q) Conflict of Laws (1935), vol. 2, § 332.2., pp. 1079 ff., substantially reproducing passages from the author's article What Law Governs the Validity of a Contract (1909-1910), 23 Harv. L. Rev. 1, at pp. 260 ff.

(r) Validity and Effects of Contracts in the Conflict of Laws (1921), 30 Columbia L. Rev. 565, at p. 658.

curately points out (*t*) that there is no difficulty about giving effect to the parties' selection of the law which is to govern the interpretation of their language.

Johnson (*u*), writing "with special reference" to the law of Quebec, is bound by article 8 of the Civil Code of Lower Canada, which provides that effect is to be given to the expressed or presumed intention of the parties in the selection of the proper law, but he suggests some limitations in the application of the principle stated in the article.

The latest study of the intention doctrine, that of Cook (*v*), is especially interesting because the author submits that the rule that the parties may select their own law is not inherently or theoretically objectionable. He gives various examples of cases in which the parties admittedly may modify rules of law which would otherwise govern their rights and liabilities. It is doubtful, however, whether he gives any example which quite touches the crucial point, namely, that the parties cannot by any contractual provision (whether by the incorporation of provisions of some foreign law or otherwise), render intrinsically valid a contract which is intrinsically invalid by its true proper law (ascertained on substantial considerations) and that their liberty to modify the application of rules of law is confined within the limits of a contract valid by that law. Furthermore Cook says (*w*):

At the outset it should perhaps be noted that so far as the present writer is aware it has never been suggested by a court or writer on Anglo-American law that the parties may choose the 'law' of any country they please, irrespective of whether or not the transaction has some substantial connection with that country. To be sure, the rule is frequently stated in language broad enough to permit such a choice, but of course, like all language, these broad expressions should be construed in the light of their context. So construed, it seems probable that the courts would hold that the parties are limited to choosing from the rules of decision found in the system of law in force in one of the states with which the transaction has a substantial connection. We shall therefore at this point discuss the problem on the basis of such a limitation on the choice of the parties.

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(s) Conflict of Laws (1927) 232, (2nd ed. 1938) 278.

(t) Goodrich, *op. cit.* (1927) 243, (2nd ed. 1938) 290.

(u) Conflict of Laws with Special Reference to the Law of the Province of Quebec, vol. 3 (1937) 418 ff.

(v) 'Contracts' and the Conflict of Laws: 'Intention' of the Parties (1938), 32 Illinois L. Rev. 899, reprinted in the same author's Logical and Legal Bases of the Conflict of Laws (1942) 389.

(w) *Op. cit.* (1942) 392.

On a subsequent page (x) the same author states his conclusions, in part, as follows:

(1) There seems to be no theoretical or practical objection to giving effect to the 'intention' of the parties when: (a) that 'intention' is expressed in words; (b) the choice is limited to the 'law' (domestic rule) of some state with which the transaction has a substantial connection; and (c) there is no reason of public policy which indicates a contrary decision. Moreover, there is no substantial reason why a state with which the transaction has a sufficient number of points of contact should not give effect to it even though by the 'law' (conflicts rule) of the 'place of contracting' it is legally ineffective. (2) The reasons for limiting the choice of the parties to the 'law' of states with which the transaction has some 'substantial connection' are purely practical: to allow a wider choice would place a possibly inconvenient burden on the courts of the forum and perhaps too often lead to a clash with the 'public policy' of the states concerned.

Obviously the various views above outlined point to practical as well as theoretical considerations which deserve at least serious discussion, but in the *Vita Food* case Lord Wright, without discussing any of these considerations, has now told us that "connection with English law (y) is not as a matter of principle essential" to the validity of the selection by the parties of English law as the proper law of the contract (z), so that the earlier *dictum* of Lord Atkin (a) that the parties' intention if expressed in the contract is conclusive, may properly be applied to a case in which the transaction has no intrinsic connection with the country the law of which has been thus selected by the parties. Clearly what Lord Atkin said with regard to the effect of an express declaration of the parties was *obiter dictum*, because the case was one in which the parties had not expressly declared their intention as to the proper law. What Lord Wright says would seem on an analysis of his judgment to be *obiter dictum*, because when he states that connection of a transaction with English law is not as a matter of principle essential to the validity of the parties' express selection of English law as the proper law, he also says that the transaction in question had some connection with English law by reason of the facts that the ship, though registered

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(x) *Op. cit.* (1942) 418.

(y) As suggested in note (n), *supra*, one should perhaps speak of the connection between the transaction and a particular country rather than to speak of the connection between the transaction and a particular system of law.

(z) [1939] A.C. 277, at p. 290, [1939] 2 D.L.R. 1, at p. 8, [1939] 1 W.W.R. 433, at p. 441.

(a) *Rex v. International Trustees for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500, at p. 529.

in Canada, was subject to the Merchant Shipping Act, 1894, and that the underwriters were likely to be English (*b*), and once it was decided that the provision of the Newfoundland statute as to the insertion of the clause paramount in every bill of lading issued in Newfoundland was directory, and not imperative, the result of the case would be the same whether the court applied the contractual provisions of the bill of lading or applied the Hague Rules appended to the statutes of Newfoundland and the United Kingdom alike. Furthermore as pointed out earlier in this chapter, Lord Wright did not purport to apply domestic English law, but English conflict rules, which were obviously applicable in any event on the assumption that English and Nova Scotia conflict rules are identical (*c*). One may perhaps be permitted to doubt whether an ultimate appellate court ought to indulge in *obiter dicta*, involving important statements of principle not required for the decision of the case on its particular facts (without adequate discussion of the implications of the principle as applied to other facts) and at least hampering the free discussion of the principle in later cases.

Apart from the *dicta* of Lord Atkin and Lord Wright, it would seem that it might be fairly contended that the rule that the proper law is the law intended by the parties is merely a judicial mode of expressing the rule that the proper law is that of the country with which the transaction has the most real connection, in the absence of an express declaration by the parties; and there does not seem to be any authority, strictly speaking, for the view that the expressed intention of the parties is always decisive, even if the transaction has no substantial connection with the country the law of which has been selected. Lord Wright has, however, now stated that view (*d*), but has

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(*b*) Why the fact that the ship was subject to the Merchant Shipping Act, 1894, should point to English law rather than the law of Newfoundland or the law of any other part of the British Empire is not clear, but even if the Merchant Shipping Act, 1894, and the conjectured English character of the underwriters, constitute a somewhat slender connection with England, they were considered by Lord Wright as constituting a valid answer on the facts to the objection that the parties were not at liberty to select English law because the transaction was not connected with England.

(*c*) See notes (e) and (f) in § 2, *supra*. Only by a stretch of the imagination can we think that the parties intended to select English conflict rules, as distinguished from domestic English law, as the proper law of the contract.

(*d*) In refusing to distinguish the *Torni* case, as mentioned earlier in this article, note (n) in § 1, *supra*, he refused to recognize the

made some significant reservations which may substantially modify the scope of the rule stated by him. The reservations are stated as follows:

provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.

The second proviso may be intended to refer to the "stringent domestic policy" (e) of the forum which may exclude any reference to a foreign law as the proper law of the contract; or, if it were not for the judgment in the *Vita Food* case, the proviso might well be construed so as to cover the suggestion approved by Cook that "it ought to be held 'contrary to the public policy' of any forum for the parties to choose a law which would nullify the Hague Rules when those rules have been adopted by the states with which the transaction is factually connected" (f). As to the first proviso, "legal" may mean that the intention must not be to select the proper law so as to attempt to give effect to a contract the making of which is prohibited by the *lex loci celebrationis* or the performance of which is prohibited by the *lex loci solutionis*. What does "*bona fide*" mean? The usual meaning of saying that the intention must be *bona fide* is that the parties cannot be supposed to be acting in good faith if they arbitrarily seek to subject the contract to the law of a country with which the transaction has no substantial connection (g), but this meaning is excluded by Lord Wright's statement that connection of the transaction with the selected law is not on principle essential. Some other meaning must therefore be found for "*bona fide*" in the first proviso. It would appear that we must look forward to further explanation of the scope of the reservations to which Lord Wright's main rule is subject. What would

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distinction between the selection of a law by which a contract should be construed (as to which the parties may have complete liberty of choice) and the law governing the intrinsic validity of the contract (as to which the liberty of the parties may well be limited).

(e) Westlake, *Private International Law*, § 215.

(f) 'Contracts' and the Conflict of Laws: 'Intention' of the Parties: Some Further Remarks (1939), 34 Illinois L. Rev. 423, at pp. 428-429. Cook adds: "Indeed, the dictum of Lord Wright in the *Vita Food* case seems too sweeping." See now the same author's *Logical and Legal Bases of the Conflict of Laws* (1942) 426.

(g) Gutteridge, in a comment on the *Vita Food* case (1939) 55 L.Q. Rev. 323, at p. 325, says: "It is difficult to conceive of any case in which a purely arbitrary choice of law can be said to be made in good faith."

he say with regard to the example given by Dicey (*h*) of a promise not made under seal or for valuable consideration, and therefore invalid by domestic English law, but as to which the parties declare that the proper law is that of some country with which the transaction has no intrinsic connection, that law being arbitrarily chosen by the parties because no consideration is required by that law for the validity of a promise? It would not appear that this hypothetical case involves any question of illegality, in any sense narrower than intrinsic invalidity in general, or any question of public policy in any sense other than that rules of law with regard to the requirements for a valid contract, like other rules of law, are expressions of public policy.

#### § 4. Exclusion of Power to Select Proper Law.

The Australians have apparently discovered an effective way of preventing a court from giving effect (in the case of a shipment from an Australian port to a port in Great Britain) to a provision in the bill of lading that the contract evidenced by the bill of lading "shall be governed by the law of England." It will be recalled that in *Vita Food Products v. Unus Shipping Co.* (*i*) the Privy Council gave effect to a similar provision in a bill of lading relating to a shipment from a Newfoundland port to New York, notwithstanding that the contract had no substantial intrinsic connection with England, and, by way of *obiter dictum*, Lord Wright stated that "connection with English law is not as a matter of principle essential" to the validity of the selection by the parties of English law as the proper law of the contract (*j*). In the case of *Ocean Steamship Co. v. Queensland State Wheat Board* (*k*) the Court of Appeal in England held that a provision of the bill of lading (clause 16) that the contract should be governed by the law of England was invalid, because of its inconsistency with another provision (clause 1) of the bill of lading as follows:

1. All the terms, provisions and conditions of the Australian Carriage of Goods by Sea Act, 1924, and the schedule thereto are to apply to the contract contained in this bill of lading; . . . If anything herein contained be inconsistent with the said Act and schedule it

(*h*) Note (*j*), *supra*.

(*i*) [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433.

(*j*) For critical comments on this dictum, see § 3 of the present chapter, *supra*.

(*k*) [1941] 1 K.B. 402.

shall, to the extent of such inconsistency and no further, be null and void.

The Australian Sea-Carriage of Goods Act, 1924, s. 9, provides, in part, as follows:

9. (1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

It is difficult to see why the Court of Appeal relied on clause 1 of the bill of lading rather than s. 9 of the statute, standing alone. Section 9 by its terms would seem to apply and render void clause 16, even in the absence of clause 1. Luxmoore L.J. even goes so far as to say that if clause 16 stood alone and there were no provision in the contract to contradict it, it would be decisive of the matter. Does he mean that in the absence of clause 1, the court would have ignored s. 9 of the statute, notwithstanding that it purports to render illegal "any stipulation or agreement to the contrary"? Illegality by the law of the place of contracting would seem to be a sufficient ground of invalidity.

The provision of s. 9 of the Australian statute making applicable the law of the place of shipment does not occur in the Newfoundland statute which was in question in the *Vita Food* case, and therefore no reference to that case was required in the *Ocean Steamship* case, and no reference to it was in fact made. As to the decisive effect of a clause in a contract that the contract shall be governed by English law, however, Luxmoore L.J. does not quote the dictum of Lord Atkin in *Rex v. International Trustee for the Protection of Bondholders Aktiengesellschaft* (1), which, in turn, was the only authority cited by Lord Wright for his dictum in the *Vita Food* case to the same effect (m).

In the *Ocean Steamship* case the matter came before an English court on an application by the owner of the vessel for leave to serve a writ out of the jurisdiction under an English rule of court authorizing leave to be given in the case of an action brought to recover damages in respect of the breach of a contract which by its terms is to be governed by English law.

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(1) [1937] A.C. 500, at p. 529.

(m) Cf. § 3 of the present chapter, *supra*.

The defendant, the Australian shipper, objected to being sued in England, and the Court of Appeal held that the case was not one in which leave might be given. On the question whether, if the case had fallen within the rule, the court would have exercised its discretion in favour of granting leave, MacKinnon and Luxmoore L.JJ. state that it is unnecessary to express an opinion, whereas du Parcq L.J. states that he would have been "little disposed" to grant leave. Although the report informs us that leave to appeal to the House of Lords was granted, such an appeal would seem to be hopeless. Nevertheless the case suggests the existence of a certain latent danger in a clause stating that the contract shall be governed by English law. There is no provision in the Canadian Water Carriage of Goods Act, 1936, corresponding with s. 9 of the Australian statute, and therefore a Canadian shipper who consents to the insertion, in a bill of lading relating to goods shipped from a Canadian port, of a provision that the contract shall be governed by English law, may find that he has not only made English law applicable to the construction and effect of the contract, but has also conferred jurisdiction upon an English court to grant leave to serve upon him in Canada a writ issued in an English action.

With particular reference to the dictum of Luxmoore L.J., above mentioned, that in the absence of clause 1 of the bill of lading the parties' selection of English law as the proper law would have been an effective contracting out of the provisions of s. 9 of the Australian statute, Morris suggests (*n*) that the result would have been that neither the English statute (limited to outward bills of lading) nor the Australian statute would apply, so that "the carrier is at liberty to contract out of the Hague Rules indirectly, although the Hague Rules say he cannot do so directly. It is submitted that this result is fatal to the fundamental objects of the Brussels Convention and can only be described as disastrous."

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(*n*) The Choice of Law Clause in Statutes (1946), 62 L.Q. Rev. 170, at p. 177.

## CHAPTER XVII.

### FRUSTRATED CONTRACTS AND UNJUST ENRICHMENT\*

In an article entitled *Frustrated Contracts: The Need for Law Reform* (a) I ventured to draw attention to the important improvement affected in the law of England by the statute of the United Kingdom entitled the Law Reform (Frustrated Contracts) Act, 1943, and, in order to make some of the relevant material readily available in Canada, I there set out not only the text of the statute, but also the text of the Seventh Interim Report (Rule in *Chandler v. Webster*) of the Law Revision Committee presented to the Parliament of the United Kingdom in 1939, and gave some account of the decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Limited* (b), which preceded, and led to the enactment of, the statute of 1943.

In a case like the present one, in which in England an effort has been made to remedy by legislation certain patent defects of the common law, it is obvious that the law of the common law provinces of Canada should not be allowed to lag behind the law of England. It seems worth while therefore to supplement my earlier article by some further observations with regard to the background and scope of the statute of 1943, and with regard to the conflict of laws aspects of some questions of unjust enrichment.

The overruling of *Chandler v. Webster* (c) in the *Fibrosa* case had remedied one defect in the law of England, but had so to speak created another, in the sense that the House of Lords' decision that the buyer was entitled to the return of his down payment on the ground of total failure of consideration might lead to injustice if the seller had incurred expense in preparing

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\*This chapter reproduces part of an article, entitled *Frustrated Contracts: The Need for Law Reform*, published (1945), 23 *Canadian Bar Review* 469-479. The portion of the chapter bearing the sub-title *Conflict of Laws* has been substantially rewritten for the present book.

(a) (1945), 23 *Can. Bar Rev.* 43.

(b) [1943] *A.C.* 32.

(c) [1904] 1 *K.B.* 493.

for performance (d). The statute has afforded a remedy for this injustice by authorizing an allowance to be made to the seller. The statute goes a good deal farther, however, in the direction of enlarging the power of a court to prevent unjust enrichment in various kinds of cases.

The statute has already been the subject of critical analysis in England by two authors, by Sir Arnold McNair in a 15-page article (e), and by Glanville L. Williams in a 92-page book (f), and has been discussed, especially from the conflict of laws point of view, by J.H.C. Morris (g). In the present chapter I will not attempt to cover the whole ground of these authors' comments, but will confine myself to an explanation of some of the main features of the statute in the setting of the old English law relating to quasi-contract. In order to avoid misunderstanding, it should be noted that it is outside the scope of the present chapter to discuss the various legal and equitable remedies available in English law for the purpose of preventing unjust enrichment, except so far as those remedies were available under the name of quasi-contract in an action of *indebitatus assumpsit*.

### *Money Had and Received.*

By the beginning of the eighteenth century it was settled law that in an action of *indebitatus assumpsit*, under a count for money had and received by the defendant to the use of the plaintiff (called for short a count for money had and received), claims might be entertained (1) to recover money paid upon a total failure of consideration, (2) to recover money paid to a person to whom it was not due, and (3) to recover money from a person who had wrongfully taken it. In each of these three cases the cause of action was nominally based on a promise to repay made by the defendant, but this promise was obviously fictitious, the promise being implied in law in order to bring the case within the action of *indebitatus assumpsit*. The defendant was held liable, not in contract, but in *quasi-contract*.

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(d) [1943] A.C. 32, at pp. 49, 50, Viscount Simon L.C.

(e) (1944), 60 L.Q. Rev. 160.

(f) The Law Reform (Frustrated Contracts) Act, 1943: The Text of the Act with an Introduction and Detailed Commentary. Stevens & Sons Limited, London, 1944. An instructive review by H. C. Gutteridge appeared in (1945), 61 L.Q. Rev. 97.

(g) The Choice of Law Clause in Statutes (1946), 62 L.Q. Rev. 170, at pp. 179-184.

that is, as if there were a contract and the obligation was imposed in order to prevent the unjust enrichment of the defendant at the expense of the plaintiff (*h*).

By 1760 actions for money had and received had increased in number and variety, and Lord Mansfield C.J., in a familiar passage in *Moses v. Macferlan* (*i*), sought to rationalize the action for money had and received, and illustrated it by some typical instances (*j*). Recovery of money paid under mistake of fact is an important example, frequently discussed in modern cases, of claims falling within the second class of claims mentioned above, but, for the present purpose, we are concerned primarily with claims falling within the first class, that is, claims for the recovery of money paid for a consideration which has failed. Causes of action of the latter kind "were assumed to be common-place by Holt C.J. in *Hoimes v. Hall* (*k*) in 1704" (*l*).

The quasi-contractual claim for recovery of money on the ground of failure of consideration was limited to the case of total failure of consideration (*m*), and in *Chandler v. Webster* it was held that the failure was not total in the case of money paid under a contract originally valid but subsequently frustrated, because the parties were only discharged from duties of performance accruing after the frustration, and that accrued obligations were not affected. The House of Lords held in the *Fibrosa* case that if the buyer had received no part of the benefit of the seller's performance, the failure of consideration was total, and therefore the buyer was entitled in quasi-contract to the return of his down payment (*n*).

The first two sub-sections of s. 1 of the Law Reform (Frustrated Contracts) Act, 1943, are as follows:

1. (1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the

(*h*) See Holdsworth, *History of English Law*, vol. 8 (1926) 92 ff. (The extension of indebitatus assumpsit to remedy cases of unjust enrichment). For the continuation of the story, see vol. 12 (1938) 542 ff.

(*i*) (1760) 2 Burr. 1005, at p. 1012: see also at p. 1008.

(*j*) See Lord Wright in the *Fibrosa* case, [1943] A.C. 32, at pp. 61 ff. As to Lord Mansfield, see also Holdsworth, *op. cit.*, note (*h*), *supra*.

(*k*) (1704), Holt 36.

(*l*) Lord Wright, [1943] A.C. 32, at p. 61.

(*m*) See, e.g., *Whincup v. Hughes* (1871), L.R. 6 C.P. 78.

(*n*) See [1943] A.C. 32, at 48, Viscount Simon L.C.

parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act (o), have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

In effect sub-s. 2 has affirmed the doctrine of the *Fibrosa* case, subject to a proviso which is designed to prevent the injustice which, as pointed out in that case, might result if the seller was compelled to return the whole of the down payment.

Sub-s. 2 is not limited, however, to the case of total failure of consideration, and in this respect it notably enlarges the field of remedy for unjust enrichment. If, for example, some small part of the consideration has been furnished by the seller, the injustice of permitting the seller to retain the down payment is almost as great as in the case of total failure of consideration, but no remedy would be available to the buyer under the doctrine of the *Fibrosa* case. The terms of sub-s. 2 seem clearly to cover the case of partial failure of consideration, subject to the proviso. Sub-s. 2 is also subject to sub-s. 1 (p), that is, it applies only to a case in which a contract "has become impossible of performance or been otherwise frustrated", and in other cases the old rule still prevails that there can be no recovery on the ground of partial failure of consideration.

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(o) Sub-ss. 3 and 4 of s. 2, are mentioned in the text, *infra*. The only other sub-section of s. 2 that should be mentioned here is sub-s. 5, which provides that the statute shall not apply to three specified cases. These excepted cases were discussed by me in (1945), 23 Can. Bar Rev. 469, at pp. 477-479, in the light of the earlier discussion by McNair, Williams and Gutteridge (notes (e) and (f), *supra*). My own opinion is that the retention of these exceptions, some of them not justified on principle, may furnish the courts with more troublesome problems than would be presented if the whole of sub-s. 5 of s. 2 were omitted so as to compel the courts to tackle the problem of unjust enrichment in the excepted cases and to apply to them the remedial provisions of sub-ss. 2 and 3 of s. 1.

(p) Sub-s. 3 (p. 360) also is governed by sub-s. 1.

*Quantum Meruit*

Sub-s. 3 of s. 1 of the Law Reform (Frustrated Contracts) Act, 1943, is as follows:

1. (3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,—

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

The foregoing sub-section breaks new ground, in the sense that it relates to a different branch of the law of quasi-contract or unjust enrichment from that which was involved in the *Fibrosa* case. Some historical introduction to the topic of *quantum meruit* would seem to be justified in order to explain the purpose and scope of the legislation.

Early in the seventeenth century the scope of the action of *indebitatus assumpsit*, theretofore limited to claims for liquidated debts unconditionally payable, as expressed in various common counts, was extended to include claims for unliquidated sums, as, for example, for services rendered on request without mention of a specific price (*quantum meruit*) or for goods sold and delivered without mention of a specific price (*quantum valebant*), the defendant's promise to pay being an actual promise implied in fact (*q*). Thus what we may call the original meaning of a claim on a *quantum meruit* was a claim for the value of complete performance as regards which the parties had failed to fix the amount to be paid.

On the other hand, as a general rule, a promisee was not (*r*) entitled to sue on a *quantum meruit* if the defendant had promised to pay a specified lump sum conditionally on complete performance and the plaintiff had only partly performed; that is, a promisor is not under a duty of immediate performance

(*q*) See Holdsworth, *History of English Law*, vol. 3 (1923) 446 ff.; Street, *Foundations of Legal Liability* (1906), vol. 3, pp. 185-188.

(*r*) Holdsworth, *op. cit.*, vol. 8 (1926) 75, 76.

until the condition of his promise has been fulfilled (*s*). In some circumstances, however, the plaintiff may be entitled, either in contract or in quasi-contract, to recover the value of his part performance.

If the promisor has received the benefit of part performance and elects to accept that benefit when he might have rejected it, he is under a contractual duty to pay for what he has received. An obvious example is the case in which a seller has delivered goods not complying with the contract description, and the buyer, instead of exercising his privilege of rejecting the goods (the delivery of which *ex hypothesi* does not fulfil the condition of the buyer's promise), elects to accept them and thereby assumes the contractual duty of paying for them, subject to his right of action or counterclaim against the seller for breach of his promise (*t*). The buyer is bound by a new implied promise, a promise implied in fact from his acceptance of the goods. In cases other than the sale of goods, and sometimes even in sale of goods cases, it may be impossible for the promisor to reject or restore the benefit received, and in that event some basis for an implied promise to pay for the benefit other than the mere retention of the benefit must be sought (*u*). If in the circumstances a promise to pay is implied, it is sometimes said that the plaintiff is entitled to recover on a *quantum meruit*. This use of the expression *quantum meruit* may be described as a secondary, but still contractual, sense, as distinguished from its original sense, already mentioned, in the case of recovery of the value of services rendered or goods delivered under a contract in which no specific price is mentioned.

Passing now over the borderline between contractual *quantum meruit* and "quasi-contractual" *quantum meruit*, we arrive at the case in which the promisor has prevented or rendered impossible the fulfilment of the condition of his promise. In that

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(*s*) Restatement of Contracts, § 250, and comment thereon.

(*t*) The result is stated in confusing terms in the Sale of Goods Act, 1893, s. 11(1) (a) (b) (c), in which the word "condition" is used in the novel sense of a promise by the seller, whereas what is meant is a promissory condition of the buyer's promise, that is, a condition of the buyer's promise the fulfilment of which is promised by the seller. As to the expression "promissory condition", see Corbin, Conditions in the Law of Contract (1919), 28 Yale L.J. 739, at p. 745, in Selected Readings on the Law of Contract (N.Y. 1931) 871, at p. 877, and Anson on Contracts (5th American edition, 1930, ed. Corbin) § 358.

(*u*) *Sumpter v. Hedges*, [1898] 1 Q.B. 673.

event the promisor is obliged to pay the value of what he has received (*v*). This is *quantum meruit* in a third sense. In order that the claim against the promisor might be brought within the scope of the action of *indebitatus assumpsit*, the obligation of the defendant was formerly expressed in terms of an implied promise, but this promise was a pure fiction (*w*), a promise implied in law as distinguished from the promise implied in fact in the cases already mentioned. The necessity for expressing the defendant's obligation in terms of a fictitious promise having disappeared with the abolition of the ancient forms of action, the obligation may now be expressed as a duty imposed by law for the purpose of preventing the unjust enrichment of the defendant at the expense of the plaintiff (*x*). Other examples of what used to be called quasi-contractual *quantum meruit* are afforded by the cases in which goods are delivered or services are rendered under an unenforceable or invalid contract (*y*).

We have now reached the limit of *quantum meruit* according to English common law. If a contract is frustrated by reason of supervening impossibility of performance not due to the fault of either party, as, for example, by destruction of the subject matter (*a*) or other circumstances rendering complete performance impossible, the promisor is excused from further performance (*b*). So, in the case of a promise requiring per-

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(*v*) *Mavor v. Pine* (1825), 3 Bing. 285; *Planché v. Colburn* (1831), 8 Bing. 14.

(*w*) Cf. note (h), *supra*.

(*x*) Happily, the expression "quasi-contract" does not occur in the statute of 1943.

(*y*) *Lawford v. Billericay R.D.C.*, [1903] 1 K.B. 772 (contract of non-trading corporation not under corporate seal); *Scott v. Pattison*, [1923] 2 K.B. 723 (contract unenforceable under the Statute of Frauds); *Craven-Ellis v. Canons*, [1936] 2 K.B. 403 (contract of corporation made by unqualified directors); cf. Wright, comment on *Craven-Ellis v. Canons* (1936), 14 Can. Bar Rev. 758; Friedmann, *The Principle of Unjust Enrichment in English Law* (1938), 16 Can. Bar Rev. 243, at pp. 250 ff., 378; Denning, *Quantum Meruit: the Case of Craven-Ellis v. Canons* (1939), 55 L.Q. Rev. 54.

(*a*) The case of the frustration of a contract for the sale of specific goods by reason of the perishing of the goods is the subject of a provision of the Sale of Goods Act.

(*b*) *Taylor v. Caldwell* (1863), 3 B. & S. 826. The proposition stated in that case that both parties were excused is a "shorthand" way of stating the result that one party was excused by reason of impossibility of performance and the other was excused by reason of total failure of consideration. Cf. my review of McElroy, *Impossibility of Performance* (1942), 20 Can. Bar Rev. 268, at p. 269.

sonal performance by the promisor, the promisor is excused by disabling illness (c), and if the promisor dies, his personal representative is excused. But, before the coming into force of s. 1(3) of the Law Reform (Frustrated Contracts) Act, 1943 (d), English law did not say that a promisor who was excused, by reason of impossibility, from performing his promise, was also excused from performing the condition of the other party's promise so as to become entitled to recover the value of his part performance of the condition. Thus, if A promises to pay B a lump sum conditionally on B's completing certain work, and B dies before completing the work, B's personal representative is not, at common law, entitled to recover for the value of the work done (e), but, it would appear, might now recover under s. 1(3) of the statute of 1943.

Again, if A promises to pay to B a lump sum on the completion of work to be done by B on A's premises, and after part of the work has been done A's premises are destroyed by fire, B is not, at common law, entitled to recover the value of the work done. As Blackburn J., delivering the judgment of the Exchequer Chamber, said (f):

... the plaintiffs, having contracted to do an entire work for a specified sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

The result in the case last mentioned would apparently not be affected by s. 1(3) of the statute of 1943, because the defendant received no benefit from the plaintiffs' part performance (g), but in other circumstances, as, for example, if the destruction of the defendant's premises was partial and the defendant received the benefit of the plaintiffs' part performance, the plaintiffs might, under the statute, recover the value of the benefit notwithstanding that the plaintiff was unable to complete his promised performance. Again, if the contract had been severable and had provided for payment in instalments as the work was done, the plaintiffs might at common law have recovered the

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(c) *Robinson v. Davison* (1871), L.R. 6 Ex. 269; *Poussard v. Spiers and Pond* (1876), 1 Q.B.D. 410.

(d) Quoted above.

(e) *Cutter v. Powell* (1795), 6 T.R. 320.

(f) *Appleby v. Myers* (1867) L.R. 2 C.P. 651, at p. 661.

(g) The remedy under the statute being limited to the benefit obtained.

amounts of the accrued instalments (*h*), and the statute contains a special provision applicable to these circumstances (*i*).

The effect of s. 1 (3) of the statute may be stated more generally, namely, that in any case of frustration of a contract by reason of circumstances rendering it impossible for one party to complete the performance which is the condition of the other person's promise, the latter is obliged to pay the value of the benefit received by him. This is subject, however, to s. 2 (3) of the statute, under which effect is to be given to any provision of the contract which "is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not" (*j*).

### *The Conflict of Laws.*

An unusual, though not unprecedented, feature of the Law Reform (Frustrated Contracts) Act, 1943, is that the scope of the statute is defined by reference to a rule of the conflict of laws (*k*). Its remedial provisions are limited in their application to a case in which a contract [1] "governed by English law" [2] "has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract." The words to which I have prefixed the numeral [2] obviously state what is assumed to be a doctrine of domestic English law as to the effect of supervening impossibility of performance of a contract, including the frustration of a contract. The words to which I have prefixed the numeral [1] refer inferentially to the English conflict rule that a contract is governed, as to its intrinsic validity and effect, by the proper law of the contract

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(*h*) *Stubbs v. Hollywell Ry. Co.* (1867), L.R. 2 Ex. 311.

(*i*) See s. 2 (4).

(*j*) A contractual provision of this kind was in question in *Robbins v. Wilson & Cabell Ltd.* (1944), 60 B.C.R. 542, [1944] 4 D.L.R. 663, [1944] 3 W.W.R. 625, cited by me (1945), 23 Can. Bar Rev. 56, and subsequently discussed by Gordon (1945), 23 Can. Bar Rev. 165, and Tuck, pp. 253, 256 ff., 261. As to the "implied term" theory and other theories of the frustration of contracts, discussed by Tuck, see also Wright, review of Webber, *Effect of War on Contracts*, (1941), 19 Can. Bar Rev. 224.

(*k*) Morris (1946), 62 L.Q. Rev. 180, does not approve of my calling this "an innovation in legislation" (23 Can. Bar Rev. 471).

(1), and provide in substance that if a court finds that the proper law of a contract is English law, so that the domestic English doctrine as to the effect of supervening impossibility of performance applies, then the remedies defined in s. 1(2) and s. 1(3) become available, and the domestic English doctrine in question is modified accordingly. These remedies are obviously designed to prevent the unjust enrichment of one of the parties to the contract at the expense of the other. Quite properly, the statute does not describe these remedies as being quasi-contractual. They are of course quasi-contractual in the sense that they constitute an extension of certain remedies, available at common law, which were described as quasi-contractual in order to bring them within the scope of the action of *assumpsit*. Owing to the abolition of the forms of action the old name quasi-contract has become inappropriate, and especially in the conflict of laws it is not desirable to continue the use of a name which in English law has a technical meaning associated with ancient procedure and in the law of countries of continental Europe has a different meaning.

If a court finds that the proper law of a contract is not English law, the provisions of the statute of 1943 are inapplicable. If the proper law is, for example, the law of Ontario, or the law of any other common law province of Canada in which the statute has not been adopted by provincial statute (*m*), or the law of Northern Ireland, then it is immaterial whether the forum is in any of these countries or is in England; a party may of course be entitled to the remedy established by the *Fibrosa* case, but the remedies provided for by the statute of 1943 will not be available. Conversely, if a court in any of these countries finds that the proper law of a contract is English law, the ample remedies against unjust enrichment provided for by the statute of 1943 are available.

It is not to be assumed that the effect of the insertion of the words "governed by English law" in s. 1(1) of the statute is exactly the same as if Parliament had provided that the statute should be applicable only to England. In the latter event a court would have had to consider whether the proper law of the contract would or should be the law governing questions

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(1) The mode in which this proper law is ascertained is discussed in chapter 14, § 5(a), and chapter 16, § 3.

(m) It is assumed that in a provincial statute the words "governed by English law" would be superseded by the words "governed by the law of this province" or other similar words.

of unjust enrichment arising from the contract, whereas under the actual wording of the statute, if the proper law of the contract is English law, that law governs questions of unjust enrichment to the extent that such questions arise from the fact that the contract "has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract," and possibly, by analogy, a court may be inclined to apply the proper law of the contract to all or any questions of unjust enrichment arising from the contract, even if such questions do not fall literally within the terms of the quoted phrase.

Williams (*n*) describes the insertion of the words "governed by English law" in the statute as a "juristic blunder," but Gutteridge (*o*) thinks this is "rather strong language in the circumstances." Morris (*p*) discusses fully the words limiting the scope of the statute to "contracts governed by English law," and concludes that they are "unnecessary and inadequate," but does not agree with Williams' reasons for criticizing them. In substance Williams' objection is that it is illogical and contrary to the better opinion of specialists in the conflict of laws to make applicable to non-contractual obligations the law which governs contractual obligations. Morris gives a reasoned answer to this objection, and concludes that it is "difficult to disagree" with the opinion expressed by me (*q*) that "if the alleged unjust enrichment results from the frustration of a contract, it is a convenient and desirable rule that the law governing the contract should also be the law governing the question whether there has been an unjust enrichment and the extent to which a remedy is available to avoid the consequent injustice."

It is true that Williams is able to cite the Restatement of the Conflict of Laws (*r*) and the opinion of Gutteridge and

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(*n*) *Op. cit.* (note (*f*), at the beginning of this chapter) 19, 20.

(*o*) (1945), 61 L.Q. Rev. 97.

(*p*) (1946), 62 L.Q. Rev. at pp. 180-184.

(*q*) (1945) 23 Can. Bar Rev. 472.

(*r*) The Restatement of the Conflict of Laws provides:

§ 452. The law of a place where a benefit is conferred determines whether the conferring of the benefit creates a right against the recipient to have compensation.

§ 453. Where a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched.

Lipstein (s) in favour of the view that the law governing remedies for unjust enrichment is the law of the place where the alleged unjust enrichment occurs, and therefore might be different from the proper law of the contract. Conflict problems relating to unjust enrichment arising from the frustration of contracts do not appear to have been discussed by English or other Anglo-American courts (t), and it is submitted that the solution adopted by the statute should be approved.

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(s) *Conflicts of Laws in Matters of Unjustifiable Enrichment* (1939), 7 *Camb. L.J.* 80.

(t) *Cf.* 2 Beale, *Conflict of Laws* (1935) 1429.

## CHAPTER XVIII.

### AGENCY; AUTHORITY AND POWER\*

If an agent (A) makes a contract or does some other act on behalf a principal (P), the distinction between A's authority and his power is well known and fundamental in the domestic law of agency. A's authority is coextensive with the assent of P to A's acting for him, whereas his power to bind P or to change the legal relations between P and a third party (TP) may be much wider. A has of course power to bind P by any act done within the scope of his authority. Even if A acts without authority he may have power to bind P within the scope of his apparent authority, that is, if by reason of the conduct of P, A appears to TP to have authority. Furthermore, in some limited classes of situations, A may have power to bind P even though he is neither authorized nor apparently authorized (a).

It is submitted that this distinction between authority and power also deserves more attention than it has hitherto received in agency problems in the conflict of laws. Broadly speaking, the construction and scope of the authority given by P to A would seem to be a matter which is primarily governed by the proper law of the contract or other transaction between P and A, this proper law being the law of the country with which the transaction is most closely connected, due consideration being given to the place in which the transaction between P and A is entered into, the place or places in which P and A reside or carry on business, the place or places in which it is intended that the authority shall be exercised, etc. On the other hand the power of A to bind P or to change the legal relations of P and TP would appear to be a matter which is governed primarily by the law of the country in which the transaction be-

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\*This chapter (with the exception of the first three paragraphs, transferred from chapter 31) reproduces a comment published (1939), 17 Canadian Bar Review 672-676.

(a) See, e.g., Seavey, *The Rationale of Agency* (1920), 29 Yale L.J. 859; Wright, *The American Law Institute's Restatement of Contracts and Agency* (1935), 1 U. of Toronto L.J. 17, at pp. 40 ff.; *Restatement of Agency* (1933), § 140; Falconbridge, *The Law of Agency* (1939), 17 Can. Bar Rev. 248.

tween A and TP takes place, clearly if P has assented to the authority being exercised there, and perhaps also if he has merely failed to limit the exercise of the authority so as to exclude the country in which A acts. On this principle, P should be bound by A's acts if the law of that country confers on A in the particular circumstances the power to bind P, whether that power is based on authority or apparent authority or is a power wider than either authority or apparent authority.

If A purports to transfer or otherwise affect P's interest in land, it is clear that A's power to bind P must be governed by the *lex rei sitae*, whereas A's power to impose a personal duty on P may be governed by some other law (b).

In *Sinfra Aktiengesellschaft v. Sinfra Ltd.* (c) the plaintiff was a company incorporated in 1933 under the law of Switzerland for the purpose of marketing certain patents owned by one Meiwald, a German national, or the machines to be manufactured in accordance with the patents. In 1935, in Switzerland, the company, through Meiwald, authorized one Wronker-Flatow, a German national (who had recently left Germany, financially destitute), to go to the United States of America to complete negotiations begun there by Meiwald. These negotiations proving to be fruitless, Meiwald joined Wronker-Flatow in the United States, and on their way back to Europe on the S.S. Washington they signed an agreement (referred to in the case as the Washington agreement) by which the plaintiff company should become a holding company, and subsidiary companies should be organized with the help of financial men whose interest might be secured with the assistance of Wronker-Flatow. The agreement was subsequently approved by the plaintiff company, and among the companies organized pursuant to the agreement was the defendant company, incorporated in England in 1936. Shortly afterwards, in Switzerland, the plaintiff company, hereinafter called P (the principal), issued to Wronker-Flatow, hereinafter called A (the agent), a power of attorney (d) which the latter might exhibit to third

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(b) This may involve the difficult distinction discussed in chapter 30.

(c) [1939] 2 All E.R. 675.

(d) The expression "power of attorney", in inveterate use in English, is confusing because the so-called power is not a power but is merely a manifestation of the authority given by P to A. Quite another question is what is A's power to bind P under the authority expressed in the "power of attorney."

parties, without disclosing the financial terms as between P and A contained in the Washington agreement. The power of attorney went beyond the agreement in one respect in that it authorized A to join the board of a subsidiary company and exercise voting powers. On the instructions of A, within the scope of his authority as stated in the power of attorney, the defendant company, hereinafter called TP (the third party), made certain payments on behalf of P, and TP counterclaimed for the amount of these payments in an action for money had and received brought by P against TP. P's defence to the counterclaim was based on the fact that P had revoked A's authority, and that TP knew of the revocation at the time of the payments in question. TP contended in reply that A's authority was irrevocable because it was an authority coupled with an interest, and therefore that the payments were properly made on A's instructions. It was agreed that the construction and validity of the Washington agreement and the revocation of any authority given by it were governed by German law, and on a conflict of witnesses as to German law, Lewis J. held that the agreement was one for service, and not for a partnership or quasi-partnership, and that the authority was revocable. As regards the power of attorney Lewis J. held that the governing law was English law, so far as the authority was to be exercised in England, that by English law the authority was not coupled with an interest, and that the authority was revocable, and therefore that P was entitled to succeed against TP. The same result, he held, would be reached if either Swiss law or German law were applied to the power of attorney.

The judgment contains a casual reference to *Chatenay v. Brazilian Submarine Telegraph Co.* (e) and no reference at all to *Ruby Steamship Corporation v. Commercial Union Assurance Co.* (f), although both cases would seem to deserve serious con-

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(e) [1891] 1 Q.B. 79, C.A. The reference is to the following passage in the judgment of Lindley L.J., at p. 85: "We have to deal with a power of attorney—a one-sided instrument, an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract."

(f) (1933), 150 L.T. 38, 39 Com. Cas. 48, 46 Ll. L. Rep. 265, C.A. See comment on this case in (1934), 5 Cambridge L.J. 251. The judgment is quoted in full with comment by Dr. Magdalene Schoch, in 4 *Giurisprudenza Comparata di Diritto Internazionale Privato* 285. It is not cited in Cheshire, *Private International Law* (2nd ed. 1938) or in Breslauer, *Agency in Private International Law* (1938), 50 *Juridical Review* 282. The last mentioned article is noteworthy as a methodical and specific study of certain aspects of agency law

sideration in the circumstances. In the *Chatenay* case the plaintiff, a Brazilian national, resident in Brazil, signed in Brazil a power of attorney in the Portuguese language authorizing a broker resident in England to buy and sell shares. The broker having failed to account for the proceeds of certain shares in the defendant company sold by him for the plaintiff, and the shares having been transferred to the purchasers in the books of the company, the plaintiff brought an action for rectification of the register on the ground that the sale of the shares was unauthorized. On the trial of a preliminary issue to determine whether Brazilian law or English law governed the construction of the power of attorney, it was held by the Court of Appeal, according to the headnote, "that the intention of the plaintiff was to be ascertained by evidence of competent translators and experts, including if necessary Brazilian lawyers, and that if, according to such evidence, the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law." We are not told what was the result of applying English law, but the argument for the plaintiff is reported in part as follows: "It would be impossible for a third party contracting in England with the agent to determine what is the law of Brazil applicable to the transaction. It is enough for him to see what is the apparent authority given to the agent with respect to a transaction in England, and then to determine what is the law of England applicable to it. The contention of the plaintiff is that if the power of attorney is construed according to English law, it did not authorize the transfer of any shares without a letter of advice from the plaintiff to his agent. This the company would be able to see for themselves, and they acted wrongly in not demanding the production of such an authority." On the other hand, counsel for the defendant company said in part: "If the view of the defendants is correct and the document is to be construed according to the law of Brazil, then they are in a position to show that the authority is perfectly general to buy and sell, so that the plaintiff would be bound by the acts of his agent. If the opposite view is right, he might be

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from the point of view of the conflict of laws. Briefer discussion of analogous problems is to be found in Westlake, *Private International Law*, §§ 151, 223, 224; Foote, *Private International Law* (5th ed. 1925) 474-476; Dicey, *Conflict of Laws*, rules 179, 180; the *Conflict of Laws Restatement* (1934), especially §§ 342-345; 2 Beale, *Conflict of Laws* (1935), pp. 1192-1199.

bound in one country and not bound in another in transactions exactly similar in character."

The reference in the argument above quoted to "apparent authority" points of course to the principle that A may have power to bind P even though A acts beyond the scope of his authority. As stated at the beginning of this chapter, this distinction between authority and power is fundamental in the domestic law of agency and, it is submitted, may be important in agency problems in the conflict of laws. What was really in issue in the *Chatenay* case was whether A had power to bind P in the circumstances, and not merely whether A had authority, because P might be bound by A's unauthorized act. Authority is a matter solely between P and A, and the question is simply whether P has expressly or impliedly authorized A to do the act in question. In the conflict of laws it would seem that this question should be governed by the proper law of the transaction between P and A. (I avoid saying the "proper law of the contract", because a contract between P and A is not essential to the existence of the relation of principal and agent; all that is required is P's assent to A's acting for him, and the assent of A.) This proper law would ordinarily be the law of the country in which the alleged authority is given, though, if the authority is to be exercised in another country, the law of that country may be the proper law. The matter of A's power to bind P, on the other hand, it is submitted, should ordinarily be determined by the law of the country in which A acts, at least if P has authorized A to act for him in that country. P may be bound to TP by A's act either because the act is an authorized act, that is, is within the scope of A's authority as construed by its proper law, or because the law of the country in which A acts confers a power on A to bind P in the circumstances by an unauthorized act on the basis of apparent authority or independently of either authority or apparent authority.

The *Chatenay* case and the *Sinfra* case are substantially in accord with one another, whether one reaches the result by construing the authority given by P so as to cover the act done by A or, as may be preferable, by saying that under the law of the country in which A acted he had power to bind P even, by an unauthorized act; but it is not so easy to reconcile either of these cases with the *Ruby* case (g). The facts of the *Ruby*

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(g) Note (f), *supra*.

case are complicated, but for the present purpose it is sufficient to state that a New York broker was instructed in New York to obtain insurance in England on a ship, and that he necessarily employed an English broker, who effected insurance with an English underwriter. Under English law the English broker became liable to the underwriter for the premium, and because the underwriter had acknowledged receipt of the premium the broker and the underwriter were not entitled, without the consent of the assured, to cancel the policy for non-payment of the premium (*h*), but the English broker would naturally look to the New York broker for the premium, and the New York broker in turn look to the assured. According to New York law, applicable to insurance effected in New York, a broker and an insurer may cancel insurance without the consent of the assured on the ground of non-payment of the premium by the assured. The Court of Appeal held that the governing law was New York law, on the principle stated in Dicey's rule 179 (*i*): "The agent's authority as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created." One would have thought that in the *Ruby* case it might have been worth while for the court to discuss the *Chatenay* case, and that in the *Sinfra* case it might have been worth while for the court to discuss the *Ruby* case. If the law of the country in which the agent acted was the governing law in the *Chatenay* and *Sinfra* cases, it is not obvious how in the *Ruby* case a policy obtained in England by an English broker from an English underwriter—a policy which by English law could not be cancelled without the consent of the assured—was transformed into

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(*h*) *Xenos v. Wickham* (1866), L.R. 2 H.L. 296.

(*i*) Supported by a dictum of Lindley L.J., delivering the judgment of the Court of Appeal, in *Maspons y Hermanos v. Mildred* (1882), 9 Q.B.D. 530, at p. 539; but it is to be noted that Lindley L.J. said that the law of the place in which P gives authority to A must "be taken into account in considering the nature and extent of the authority given" by P to A, but is not "material for any other purpose." In the particular case A, without disclosing P, made a contract in his own name but really for P with TP, and accordingly A shipped goods from Cuba to TP in England and TP obtained insurance upon the goods in England in the name of TP for the benefit of all persons whom it might concern. The goods having been lost at sea, A having become insolvent and TP having received the insurance money, it was held that the right, if any, of P. as undisclosed principal, to sue TP in respect of the insurance money was governed by English law, not Spanish (Cuban) law.

a policy which under New York law could be cancelled by agreement between the English underwriter and a New York broker without the consent of the assured. It is submitted that problems of agency in the conflict of laws deserve more consideration than they have so far received from English courts.

In connection with the subject of the present chapter reference should be made to Hohfeld's article on *The Individual Liability of Stockholders and the Conflict of Laws* (*j*), in the course of which he discusses the rules of law applicable to several contractual obligations arising through agency (*k*), and lays stress on the importance of distinguishing between three questions: (a) What laws, if any, have a bearing on the *scope of an agent's authority* to contract in behalf of his principal in a foreign country? (b) What law determines whether or not the *effect* of the agent's authorized act is to impose upon the principal any obligation at all? (c) What law determines the *extent or limitations* of the obligation imposed on the principal by reason of the agent's act?

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(*j*) (1909), 9 Columbia L. Rev. 492, reprinted in his *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1923) 229. The article relates to various questions suggested by the case of *Risdon Iron and Locomotive Works v. Furness*, [1905] 1 K.B. 304, affirmed, [1906] 1 K.B. 49.

(*k*) *Fundamental Legal Conceptions* (1923) 243 ff.

## CHAPTER XIX.

### CONTRACT AND CONVEYANCE: PERSONAL CHATTELS\*

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#### § 1. Introduction.

The main object of this chapter is to discuss the problems arising in the conflict of laws in cases which lie in the borderland between contract and conveyance (*a*), when the proper

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\*This chapter reproduces in a revised form an article, entitled Contract and Conveyance in the Conflict of Laws, published [1934] 2 Dominion Law Reports 1-44, which was in substance part of an article bearing the same title, published (1933), 81 University of Pennsylvania Law Review 661-683, 817-846. A portion of the original article was revised and translated into French, and appeared under the title Contrat et Transfert de Propriété dans le Conflit de Lois in the Recueil d'Etudes en l'honneur d' Edouard Lambert (1938) at pp. 180-197.

(*a*) See, especially, Goodrich, Conflict of Laws (2nd ed. 1938) 406 ff., section entitled Contract and Conveyance, followed, as in the

law of a contract relating to a chattel differs from the law governing the property in the chattel.

The discussion is limited, so far as is practicable, to personal chattels or movables, and omits consideration of intangibles (*b*) (including negotiable instruments) (*c*), and of immovables of all kinds (*d*). Even within this limited sphere the distinction between a contract relating to a thing and a conveyance of a thing presents itself as a matter of characterization of the question—a matter which must be decided by a court as a necessary preliminary to the court's selection of the proper law, that is, the law to be applied by the court in deciding the main question (*e*). The discussion is also limited to transfer by particular assignment *inter vivos*, and does not include the discussion of universal or general assignment on bankruptcy or death (*f*).

In order to avoid repetition I merely refer here to the discussion in another chapter of the classification of things as (1) immovable (land) and (2) movable, the latter adjective being properly applicable only to tangible things, but being traditionally applied also to intangible things, and of the distinction between things on the one hand and the property or an interest in things on the other hand (*g*).

As regards what I have mentioned above as being the main object of the present chapter, I have throughout the chapter assumed the accuracy of the view, which is traditional in the systems of the conflict of laws prevailing generally in Anglo-American countries, as well as other countries, that a line of demarcation can be drawn between a person's right with respect

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present chapter, by a discussion of the conditional sale and chattel mortgage situations; *cf. ibid.*, pp. 392 ff., as to conveyances of land and contracts relating to land. See also 64 L.R.A., pp. 823 ff. (1904): 11 L.R.A. (N.S.), pp. 1007 ff. (1908). As to conditional sales and chattel mortgages, see the further references in § 4(1) of the present chapter. The contrast between contract and conveyance is briefly discussed in Foote, *Private International Law* (5th ed. 1925) 284-286, 357, 446 ff.; *cf. Westlake, Private International Law* §§ 156, 172 and 216; Dicey, *Conflict of Laws* (5th ed. 1932) rules 150-154, 163 and 164. The contrast is pointedly discussed by some continental writers, cited in § 3(4) (e) of the present chapter.

(*b*) See chapter 20.

(*c*) See chapter 14, § 4.

(*d*) See chapter 30.

(*e*) See chapters 3 and 4.

(*f*) As to succession to movables and intangibles on death, see chapter 32; as to succession to land, see chapter 22, § 2.

(*g*) See chapter 21.

to a thing (*jus ad rem*) and his property or interest in the thing (*jus in re*). If the property in a thing is, however, merely a bundle of rights, privileges, powers and immunities which a person has with respect to a thing, and if these four terms are merely descriptive of the beneficial aspects of various legal relations existing between him and other persons, there is no logical distinction between a "personal" right (*jus in personam*) and a "real" right (*h*).

## § 2. The Conveyance of a Chattel.

### (1) General Rule

In accordance with the view generally prevailing in other systems of the conflict of laws (*i*), the general rule would appear to be well established in Anglo-American law that the transfer of the property in movables or of any less extensive real rights in them, or, more broadly, the creation, dismemberment, or extinction of the property in movables, is governed by the *lex rei sitae* (*j*). The rule necessarily applies to any

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(*h*) See especially chapter 30, §§ 2 and 3, where the alleged distinction between the property in land and contractual or equitable rights with respect to land is discussed.

(*i*) The rule is clear in France. Niboyet, *Manuel de Droit International Privé*, Paris, 1928, § 506, p. 633. Also in Germany (where Wächter and Savigny exercised a dominating influence in favour of the recognition of the *lex rei sitae* as against the *lex domicilii*). Lewald, in *Répertoire de Droit International*, vol. 7, Paris, 1930, p. 367. The case of Italy is especially interesting, because the *lex rei sitae* is there applied to questions of property rights in movables, notwithstanding the ambiguity of the relevant statutory text. Udina, in *Répertoire de Droit International*, vol. 6 (Paris, 1930) 508-509. In Quebec, article 6 of the Civil Code provides, subject to certain exceptions, that "movable property is governed by the law of the domicile of the owner," and it is impossible to say definitely how far this will prevent the courts of Quebec from following the modern *jurisprudence* of France in favour of the application of the *lex rei sitae*. The matter is fully discussed in Johnson, *Conflict of Laws*, vol. 3 (1937) 217 ff. It has been held that the title to a stolen horse acquired by purchase in market overt in Ireland is entitled to recognition in Scotland, notwithstanding that by Scottish law a sale of a stolen horse in Scotland would not confer a good title; the *vittium reale* which is indelible by Scottish law is purged by the sale in Ireland. *Todd v. Armour* (1882), 9 Rettie (Ct. of Sess.) 901. So, there is no reason to doubt that a title validly acquired by purchase in market overt in England or Ireland would be recognized in Ontario, notwithstanding that the Ontario Sale of Goods Act provides that "the law relating to market overt shall not apply to any sale of goods which takes place in Ontario."

(*j*) The discussion is of course confined to transfer *inter vivos* by particular, as distinguished from universal, assignment.

essential requirements of the *lex rei sitae* as to formalities of conveyance as well as any other questions of the intrinsic validity of the conveyance (*k*).

In England the rule has been clear since 1860. In 1858 there was published the first edition of Westlake on Private International Law, of which chapter VIII (Movables) contained an exposition for English readers of the view of Savigny and Foelix, and Westlake's own argument (*l*) in favour of the application of the *lex situs* of the movable as against the *lex domicilii* of the owner. Sometime in the same year (1858) the Court of Exchequer decided the case of *Cammell v. Sewell* (*m*), and its judgment was in 1860 affirmed by the Court of Exchequer Chamber (*n*). The case was that of the sale of certain timber, the cargo of a ship which had been wrecked on the coast of Norway. The sale of the timber in Norway by the master of the ship was held to be valid in England because it was valid by Norwegian law (*o*). The place in which the sale took place happened to be the same as the place in which the goods were situated, and in some English cases the rule has been stated that the transfer is governed by the law of the place of transfer (*p*), but the rule approved by the Court

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(*k*) Cf. Dicey, *Conflict of Laws* (5th ed. 1932), exception to his rule 154. In the rule itself, stated somewhat doubtfully, it is submitted that the author is unduly conservative, and fails to recognize sufficiently the trend of the modern decisions in favour of the *lex rei sitae*. Cf. Goodrich, *Conflict of Laws* (2nd ed. 1938) 440.

(*l*) It is interesting to compare this somewhat argumentative chapter with chapter VII of the more recent editions, in which the rule is stated as being settled. See also Foote, *Private International Law* (5th ed. 1925) 284 ff.

(*m*) (1858), 3 H. & N. 617.

(*n*) (1860), 5 H. & N. 728. In the Court of Exchequer the judgment was based upon the fact that the sale in Norway had been confirmed by the judgment of a Norwegian court, but in the course of the argument Pollock C.B. put the case simply on the ground of a sale valid by the *lex rei sitae* and therefore valid elsewhere; and in the Court of Exchequer Chamber this dictum of Pollock C.B. was adopted as the ground of decision. Westlake's book was cited in argument in the Exchequer Chamber, and we may conjecture that Westlake probably exercised an important influence in favour of the *lex rei sitae* as against the *lex domicilii*, but the report of *Cammell v. Sewell* does not furnish precise evidence on this point.

(*o*) Although the contest was between the English consignees and the Norwegian buyer, the timber had been shipped in Russia, upon a Prussian ship, and, as pointed out by Cockburn C.J., there was no evidence that the sale would have been invalid by either Russian law or Prussian law.

(*p*) E.g., *Alcock v. Smith*, [1892] 1 Ch. 238, at p. 267, Kay L.J.; Cf. *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K.B. 677, at p. 683, Vaughan Williams L.J. As to these cases, see chapter 14, § 4(d).

of Exchequer Chamber in *Cammell v. Sewell* is that a disposition made in accordance with the law of the place where the goods are is binding everywhere (*q*), and it seems clear that if the place of transfer differs from the situs of the goods, it is the *lex rei sitae* which governs (*r*).

In the United States also it would seem to be clear that the modern rule is that the law governing the creation and transfer of interests in movables is the *lex rei sitae*, notwithstanding occasional recognition of an older view, approved by Story, that the governing law is the *lex domicilii* of the owner (*s*).

The Conflict of Laws Restatement of the American Law Institute provides that the capacity to make a valid conveyance of an interest in a chattel (§ 255), the formal validity of a conveyance of an interest in a chattel (§ 256), the validity in other respects of a conveyance of a chattel (§ 257), and the nature of the interest created by a conveyance of a chattel (§ 258), are all determined by the law of the state (place, § 258) where the chattel is at the time of the conveyance.

## (2) *Change of Situs Without Consent of Owner.*

The general conveyancing rule just stated involves as its ordinary consequence that a title to a chattel acquired under the law of X, where the chattel is situated, is entitled to recognition in Y, subject to any inconsistent rule of public policy of Y, but that the title so acquired may be overridden by a title validly acquired under the law of Y, after the removal of the chattel to Y (*a*).

(*q*) Cf. *Re Anziani, Herbert v. Christopherson*, [1930] 1 Ch. 407, at p. 420, Maugham J.: "I do not think that anybody can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the moveable is situate. Business could not be carried on if that were not so."

(*r*) Cf. Foote, *op. cit.*, 293, 294; Dicey, *Conflict of Laws* (5th ed. 1932), notes to his rule 152, is to the same effect, notwithstanding that, somewhat oddly, he incorporates in his text a quotation from Kay L.J. in *Alcock v. Smith*, *supra*, and relegates to a footnote a quotation from *Cammell v. Sewell*. See also the Ontario case of *River Stave Co. v. Sill* (1886), 12 O.R. 557, followed in *Marthinson v. Patterson* (1890), 20 O.R. 125, affirmed (1892), 19 O.A.R. 188 (both cases of chattel mortgages).

(*s*) Goodrich, *Conflict of Laws* (2nd ed. 1938) 409, citing, *inter alia*, *Green v. Van Buskirk* (1866-1868), 5 Wall. 307, 7 Wall. 139, for the *lex rei sitae* as against the *lex domicilii*, and *Guillander v. Howell* (1866), 35 N.Y. 657, for the *lex rei sitae* as against the *lex loci actus*. See also Beale, *Cases on Conflict of Laws*, 1st ed. vol. 2, p. 158, note 1 (to *Cammell v. Sewell*).

(*a*) See § 3(2)(3), *infra*.

Although it is established that as a general rule the *lex rei sitae* governs all matters as to the conveyance of the chattel or of any real right in it, troublesome questions arise as to possible exceptions to the general rule (b).

In a "caveat" to §§ 256 and 257 of the Conflict of Laws Restatement the American Law Institute says:

The Institute expresses no opinion whether the conveyance of an aggregate unit of movables may not be governed by the law of the place where the various items are aggregated as a unit, or that a conveyance of an aggregate unit made up of a number of units, themselves aggregates, may not be governed by the law of the place where the entire unit is managed so far as such conveyance is not contrary to the public policy of a state in which any constituent unit is.

One important question is whether any modification of the general rule should be admitted if a chattel is removed from one country to another without the express or implied consent of the owner.

In the United States there is some authority in favour of the view expressed in § 52 of the Proposed Final Draft of the Conflict of Laws Restatement of the American Law Institute, namely, that if a chattel is taken without the owner's consent to a country of which he is not a citizen or in which he is not domiciled that country has no jurisdiction over his title to the chattel until he has had a reasonable opportunity to remove it or until the period of prescription in that country has run.

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(b) It is not intended to discuss the case of ships, or goods in course of transit. As Westlake says in his comments on his § 150, it would be pedantic to apply the general doctrine so as to bring in the law of a casual and temporary situs, not contemplated by either party in the dealing under consideration. Goods in course of transit give rise to particularly difficult problems the discussion of which is outside the scope of this article. One attempt to solve these problems is expressed in the international convention concerning conflict of laws relating to the transfer of property in goods under contracts of sale, prepared by a committee of the International Law Association. Two classes of cases as to goods in transit have to be considered, namely, (1) goods which are in transit from seller to buyer, pursuant to a contract of sale, giving rise to the question, what is the law governing the passing of the property under that contract, and (2) goods which while they are in transit are the subject of a subsequent transaction, giving rise to the question, what is the law governing the property effect of that transaction. Cf. Lewald, in *Répertoire de Droit International*, vol. 7 (Paris, 1930) 375, referring specially to Niboyet, *Des Conflits de Lois relatifs à l'Acquisition de la Propriété et des Droits sur les Meubles Corporels à Titre Particulier* (Paris, 1912) 55 ff. See also Hellendall, *The Res in Transitu and Similar Problems in the Conflict of Laws* (1939), 17 *Can. Bar Rev.* 7, 105.

As promulgated in 1934 the Restatement contains, in place of the former § 52, merely a caveat appended to § 49, that no opinion is "expressed on the question whether a state from which a chattel has been removed without the consent of the owner may not also exercise legislative jurisdiction over the title to the chattel," followed by a comment: "Even though a state may have jurisdiction over a chattel brought into the state without the consent of the owner, it does not, at common law, exercise such jurisdiction over the title to the chattel" (c).

The persuasive authority of Beale can be invoked in favour of both the general principle of § 52 and the expression of that principle in terms of jurisdiction (d). The case of *Edgerly v. Bush* (e) apparently is, he says, the only direct authority for the proposition that if A is owner under the law of state X of a chattel situated there, and the chattel is taken to state Y without the express or implied consent of the owner, state Y has no jurisdiction to divest the owner's title in favour of a purchaser or mortgagee there. In the case mentioned the plaintiff, a mortgagee, had a good title to a span of horses by the law of New York. The horses were then taken by the mortgagor to the province of Quebec, without the consent of the plaintiff and in breach of the contract between the parties. They were subsequently sold in Quebec by a "regular trader, dealing in horses" to a purchaser in good faith and without notice, and later were resold to the defendant. In an action brought in New York for conversion, it was held that if the law of Quebec were the governing law the defendant would have a good title (f), but that effect would not be given in

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(c) See also to the same effect comment (c) and caveat to § 102. As to the removal of a mortgaged chattel, without the consent of the mortgagee, see § 268; as to the removal of a chattel which is the subject of a conditional sale, without the consent of the conditional seller, see § 275.

(d) Beale, Jurisdiction over Title of Absent Owner in a Chattel (1927), 40 Harv. L. Rev. 805; cf. Jurisdiction over Movable Property brought into a State without the Owner's Consent (1911), 24 Harv. L. Rev. 567.

(e) (1880), 81 N.Y. 199.

(f) As to the effect of art. 1489 C.C. (Que.), in question in *Edgerly v. Bush*, see *McKenna v. Prieur and Hope*, (1925), 56 O.L.R. 389, [1925] 2 D.L.R. 460, in § 3(3), *infra*, from which it appears that the sale by the trader in Quebec would not convey to the purchaser any proprietary right as against the true owner. Under art. 1487 "the sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles."

New York to the law of Quebec so as to divest a title lawfully acquired and held under the law of New York, in a case in which the chattels had been removed to Quebec without the consent and against the will of the owner. "We doubt," said the court, "whether . . . it has ever been adjudged that such title has been divested by the surreptitious removal of the thing into another state, and a sale of it there under different laws" (*g*).

The doctrine which underlies the particular form of statement contained in § 52, (that is, the lack of jurisdiction or power of a state to affect or divest a title validly created under the law of some other state which in the circumstances is regarded as being the sole law governing the title) has been the subject of some criticism (*h*). If valid, the doctrine seems to involve some possible consequences peculiar to the constitutional law of the United States (*i*). Upon this I do not venture to express any opinion.

It is of course another question whether the principle of § 52, regardless of its particular mode of expression, is socially desirable, that is, whether the rule that the *lex rei sitae* governs the conveyance of a chattel ought to be modified in the case of a chattel which has been taken from one country to another without the owner's consent, and dealt with in the latter country (*j*).

The question may be regarded as the conflict of laws phase of the ancient question upon which different systems of local laws have taken different views (*k*), namely, where the line is to be drawn between the protection of the interest of an owner

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(*g*) I have omitted some other grounds of decision mentioned in the judgment, all eliminated as untenable by Beale in the article already cited.

(*h*) See especially *Validity of Judgments refusing Recognition to Chattel Mortgages recorded in another State* (1928), 37 *Yale L.J.* 966, and the articles there cited.

(*i*) *Chattel Mortgages and Conditional Sale Recording Acts in the Conflict of Laws* (1928), 41 *Harv. L. Rev.* 779; note already cited, 37 *Yale L.J.* 966, at pp. 969-971.

(*j*) The desirability of some modification of the rule seems to be approved in the articles already cited, 40 *Harv. L.R.* 805, at p. 810, and 37 *Yale L.J.* 966, at p. 971. Goodrich, *Conflict of Laws* (2nd ed. 1938) 412, mentions some analogies pro and con, and is inclined to doubt the existence of the suggested exception to full control by the law of the situs, but expresses no opinion as to its desirability.

(*k*) See, e.g., Franklin, *Security of Acquisition and of Transaction: La Possession Vaut Titre and Bona Fide Purchase* (1932), 6 *Tulane L.R.* 589.

out of possession and the protection of the interest of an innocent purchaser from the possessor. If the desirability of the proposed modification of the conveyancing rule in the conflict of laws is tested by reference to the policy of the common law with regard to domestic transactions not involving any foreign element, the proposed modification may be said to be in accord with the traditional policy of the common law to protect the owner rather than the innocent purchaser (*l*), as contrasted with the policy of the civil law to protect the purchaser rather than the owner. It may be remarked, however, that the pronounced tendency of modern English legislation has been to extend the cases in which protection is given to the innocent purchaser at the expense of the owner (*m*), and in the United States and Canada the general object of chattel mortgage and conditional sale legislation is to give to an innocent purchaser a larger measure of protection than the common law gave him. Some of the cases, not yet remedied by legislation, in which title rather than purchase is still protected by the common law, are hard to justify on principle, as contrasted with other cases in which purchase is protected rather than title (*n*).

The extreme case of removal without the owner's consent is the case of a stolen chattel, and the question might be put in this form: If a chattel were sold in market overt in England, would it make any difference to the validity of the buyer's title that the chattel had been stolen by the seller in Scotland or France? If not, *a fortiori*, if a sale is made in England by a person who is in possession of a chattel with the owner's consent, and in such circumstances that by English law he can give a good title as against the owner to a third party, it would make no difference that the chattel had been removed to England without the owner's consent. In any event the question is of course not merely whether the sale is valid in England, but whether the sale in England is entitled to recognition elsewhere.

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(*l*) As expressed bluntly but too broadly, in *Edgerly v. Bush* (1880), 81 N.Y. at p. 204: "Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title."

(*m*) See the successive Factors Acts of 1823, 1825, 1842, 1877 and 1889; the Sale of Goods Act, 1893, s. 25. The Factors Act, 1889, and the Sale of Goods Act have been re-enacted in all the common law provinces of Canada.

(*n*) Cf. article cited, *supra*, 6 Tulane L.R., pp. 594-595.

While the question does not seem to have been specifically discussed in the English and Canadian cases, it seems to have been taken for granted that the validity of a conveyance by the *lex rei sitae* is not affected by the fact that the chattel has been taken to the place of transfer without the consent of the owner (o). The leading case of *Cammell v. Sewell* (p), already cited, is perhaps not conclusive on this point, because there the master of the ship, though not of course authorized to wreck the ship in Norwegian territorial waters and to sell the cargo there, did have authority to take the ship and cargo from the port of shipment in Russia to the port of destination in England, and the possibility that the ship might be wrecked in Norwegian waters and there sold in accordance with Norwegian law might be considered as one of the risks which the owners must have assumed. However that may be, Crompton J., delivering the judgment of the majority of the Court of Exchequer Chamber, said, "And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would, on that account, be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owners did not foresee that they would come to England" (q).

We have in the English case of *Embiticos v. Anglo-Austrian Bank* (r) the extreme case of a cheque drawn by a Rumanian bank in Rumania upon an English bank, stolen in Rumania, taken to Austria by the thief, and there cashed by a bank in good faith and without gross negligence so as to confer a good title by Austrian law upon the cashing bank. It was held by the Court of Appeal that the title so acquired was entitled to recognition in England. In other words, the court held that the rule that the validity of the transfer of a chattel is governed by the *lex rei sitae* (s) applies to the transfer of a cheque, and

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(o) In a Nova Scotia chattel mortgage case, *Singer Sewing Machine Co. v. McLeod* (1888), 20 N.S.R. 341, there is an *obiter dictum* that if the chattel is removed to another country without the owner's consent, the title will not be affected by a subsequent dealing there.

(p) (1860), 5 H. & N. 728.

(q) 5 H. & N. 728, at pp. 744-745.

(r) [1905] 1 K.B. 677. As to this case, see chapter 14, § 4(d).

(s) Stated in one passage in the judgment as "the law of the place where the transfer takes place." The looseness of this expression is immaterial in the particular circumstances, the place of transfer of the cheque being necessarily the same as the situs.

no difficulty was made on the ground that the cheque had been taken to the place of transfer without the consent of the owner.

Again, in the Ontario case of *McKenna v. Prieur and Hope* (*t*), a motor car was stolen in Rhode Island, and after adventures of which we have no record was the subject of a contract of sale in the province of Quebec and was subsequently delivered to the buyer in the province of Ontario and there resold by him. The Ontario court discussed the effect of the Quebec transaction (*u*), and while it was assumed that by the law of Rhode Island, as by the law of Ontario, a thief cannot give a good title, there was no suggestion that the law of either Rhode Island or Ontario could be applied if it should appear that the Quebec buyer got a good title by the law of Quebec.

It would appear that in France the *lex rei sitae* will be applied to determine the property in movables actually situated in France, without regard to the reasons why they are so situated, whether as the result of *force majeure* or without the consent of the owner or otherwise (*v*). So, in Germany (*w*).

### § 3. Borderland Between Contract and Conveyance.

#### (1) *Lex Rei Sitae Different from Proper Law.*

Stated broadly, the problem now to be discussed is, what is the result if a transaction contains both contractual and conveying elements, and the proper law of the contract (*a*) is the law of one country and the law governing the conveyance of the chattel (the *lex rei sitae*) is that of another country. The solution of the problem, broadly stated, would appear to be that the contractual effect of the transaction is governed by the proper law of the contract and the property effect by the *lex rei sitae*; and that in case of conflict the former law must yield to the latter, or, in other words, the contractual rights and duties of the parties under the proper law of the contract can

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(*t*) (1925), 56 O.L.R. 389, [1925] 2 D.L.R. 460.

(*u*) To be further discussed in § 3(3), *infra*.

(*v*) Niboyet, *Manuel de Droit International Privé*, Paris, 1928, § 509, p. 637; Lorenzen, *French Rules of the Conflict of Laws* (1928), 38 Yale L.J. 164, at p. 173.

(*w*) Frankenstein, *Internationales Privatrecht*, vol. 2, Berlin, 1929, p. 42, paragraph (b); Lewald, in *Répertoire de Droit International*, vol. 7, Paris, 1930, p. 369, § 267.

(*a*) As to the proper law of a contract, see chapter 14, § 5(a), and chapter 16, § 3.

be enforced only in so far as they are consistent with the recognition of the property rights existing or created under the *lex rei sitae*.

Under the Conflict of Laws Restatement if a contract is made in one country and relates to a chattel situated in another country, the proper law of the contract is necessarily different from the law governing the conveyance of the chattel. In stating this I am assuming that §§ 332 and following of the Restatement, which provide that the validity and effect of a contract are governed by the law of the place of making, apply to a contract relating to a chattel. Sections 340 and following specifically provide for a contract relating to land as distinguished from a conveyance of land, and, in the absence of corresponding provisions as to a contract relating to a chattel, it may be presumed that such a contract is governed by the rules applicable to contracts generally.

So, under English law, if a chattel is situated in one country, and a contract relating to it is made in another country, it may happen (depending on the other circumstances) that the proper law of the contract is different from the *lex rei sitae*. On the other hand, under English law, but not under the Restatement rule, if the situs of the chattel and the place of making of the contract are the same, it may conceivably happen that the proper law of the contract is different from the *lex rei sitae*. And what may happen under English law may of course happen under the law of a state of the United States if effect is not there given to the Restatement rule.

If, for example, a chattel is situated in one country, and an offer with regard to it is accepted in another country, the *lex rei sitae* and the proper law of the contract will necessarily be different under the Restatement rule, and may be different under the English rule. Again, if the situs and the place of making of the contract are one country, but delivery and payment are to be made in another country, the law of the former country will under the Restatement rule govern both property and contract, whereas under English law it is probable that the proper law of the contract will be held to be different from the *lex rei sitae*.

Inasmuch as English rules of conflict of laws prevail also in all those provinces of Canada in which the law is based upon the common law of England, it is not necessary here to lay stress on the fact that each province of Canada is a separate "country"

as regards the conflict of laws (*b*); and therefore I have, for the sake of simplicity of statement, spoken of "English" rules of conflict of laws, except when there appears to be some difference between the English rules and those prevailing in a Canadian province.

Special mention must, however, be made of the province of Quebec. Its law of property and civil rights, derived chiefly from French law, was codified in 1866 under the title of the Civil Code of Lower Canada. This code, unlike the French Civil Code, contains a comprehensive series of provisions relating to the conflict of laws (*c*), of which articles 7 and 8 are as follows (*d*):

7. Acts and deeds made and passed out of Lower Canada are valid, if made according to the forms required by the law of the country where they were passed or made.

8. Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed.

## (2) *Transaction in One Country and Recognition in Another.*

The Conflict of Laws Restatement, § 260, is as follows:

260. An interest in a chattel acquired in accordance with the law of the state in which the chattel is at the time when the interest is acquired will be recognized in a state into which the chattel is subsequently taken.

Returning to the broad statement already made that the law governing the conveyance of property (the *lex rei sitae*) must prevail over the proper law of the contract, if they conflict, we may attempt to classify the situations in which the conflict be-

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(*b*) See, especially as to domicile in a particular province as distinguished from domicile in Canada, *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742.

(*c*) Article 6 has been quoted in part in § 2(1), *supra*, note (i).

(*d*) As the English version quoted in the text is neither artistic nor exact, the French version is quoted here: "7. Les actes faits ou passés hors du Bas Canada sont valables, si on y a suivi les formalités requises par les lois du lieu où ils sont faits ou passés."—"8. Les actes s'interprètent et s'apprécient suivant la loi du lieu où ils sont passés, à moins qu'il n'y ait quelque loi à ce contraire, que les parties ne s'en soient exprimées autrement, ou que, de la nature de l'acte, ou des autres circonstances, il n'apparaisse que l'intention a été de s'en rapporter à la loi d'un autre lieu; auxquels cas il est donné effet à cette loi, ou à cette intention exprimée ou présumée."

tween the two laws may arise. We may suppose a transaction taking place in X between A, the owner of a chattel situated there, and B, omitting for the moment any question of a further transaction between B and a third person, C. (1) If by the *lex rei sitae* the effect of the transaction between A and B is that the property in the chattel passes absolutely to B, then B has a good title elsewhere, without regard to the effect of the transaction by the proper law of the contract. (2) So, if by the *lex rei sitae* the property passes to B in some modified sense or subject to some property right on A's part, again it would seem that whatever may be the property rights which A and B respectively retain or acquire, those property rights are entitled to recognition elsewhere, without regard to the effect of the transaction by the proper law of the contract (even if by that law an absolute title or no title, as the case may be, passes to B). (3) Lastly, if by the *lex rei sitae* the transaction is regarded as purely contractual, transferring no property right of any kind to B, it would seem that effect must be given to the negation of B's title by the *lex rei sitae* without regard to the effect of the transaction by the proper law of the contract (even if by that law B would otherwise get either a modified or an absolute title). In any of these cases, however, effect is to be given to the proper law of the contract so far as that is consistent with recognition of the title of A or B, as the case may be, existing or created under the *lex rei sitae*; though it may be conceded that the distinction between the property effect and the contractual effect of the transaction between A and B usually becomes important only by reason of some other transaction between A or B, as the case may be, and some third party who claims to have acquired or retained the title. Furthermore the reported cases usually relate only to the property aspect, if there is one, either because it happens that the contractual aspect is clear, or because, as so often happens when two innocent parties are claiming the ownership of one thing, the intermediate party who has dealt with both of them is financially worthless, so that the contractual rights of either of them against him are not worth litigation.

There may of course be various reasons why under a contract of sale or other transaction between A and B no title will pass to B. If the *lex rei sitae* is English law or a law based upon English law the reason why no title passes to B under a contract of sale may be that the subject matter is not in existence (*e.g.*, a chattel to be manufactured by A for B: future goods), or

that the subject matter is not specific (*e.g.*, a contract for sale by description: unascertained goods), or that the subject matter is not owned by A (whether it is a case of future goods—a chattel to be procured by A—or simply a case of A's purporting to sell a chattel which he does not own); or the reason why no title passes to B may be that even though the subject matter is specific and is owned by A (conditions precedent to the passing of the title to B), the contract is executory in its nature (*e.g.*, a conditional sale or other contract to sell) and is not a present sale. If the *lex rei sitae* is not English law or a law based on English law, there may be still other and different reasons why the title does not pass, (as, for example, that there has been no delivery of possession, and therefore that the transaction operates by way of contract only and not as a conveyance). We are not, however, concerned with the reasons, but must accept whatever the *lex rei sitae* tells us is the property effect of the transaction.

Conversely, the transaction between A and B may be a contract of sale under which by the law of X, where the chattel is situated, the property passes at once to B without formal conveyance and without delivery of possession; or the transaction may be one by which A, retaining possession of the chattel, transfers under the law of X a special or modified property in it, as, for example, by way of security or for some special purpose.

If we now suppose, in any of the situations just outlined, that the chattel is removed from X to Y, and consider further the question of the recognition in Y of the property effect of the transaction which took place in X, two possible limitations should be mentioned.

(a) If, for example, by the law of X the property or some partial or modified property right has passed from A to B, without delivery of possession of the chattel, the ordinary operation of the rule that B's title is entitled to recognition in Y may be prevented by the fact that the transfer of the title in the circumstances would not only be ineffective if the transaction had taken place in Y, but by a rule of public policy of Y is also regarded as ineffective even in the case of a transaction which took place in X while the chattel was situated there (*e*). The commonest example of the foregoing limitation on the recognition in Y of a title acquired in X is the case of a

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(*e*) See also the end of § 3(4), *infra*.

chattel mortgage validly created in X without delivery of possession, and the subsequent removal of the chattel to Y, the law of which refuses to recognize the mortgagee's title (*f*).

(b) In the converse case it has been said that the recognition in the new situs of a property right established under the law of the former situs is subject to a limitation, namely, that if the conditions required by the law of the former situs for the constitution of a property right have not been completely fulfilled at the time of the change of situs, it is the law of the new situs which decides what effect is to be given to the state of facts existing at the time of the change (*g*). Consequently, if a transaction takes place in X relating to a chattel situated there, and if by the law of X the title does not pass from A to B, then when the chattel is removed to Y, the law of Y becomes applicable so as to cause the title to pass to B, if by the law of Y a similar transaction taking place in Y would have had the effect of conferring the title on B.

It is submitted, however, that the limitation just stated cannot be admitted. If, for example, by the law of X the effect of a transaction which takes place between A and B relating to a chattel situated there is that no property passes to B, that is to say, if the transaction is regarded as being purely contractual or executory by the law of X, and under the law of X the property in the chattel is still in A, it seems clear that A's property right established by the law of X is entitled to recognition in Y, and consequently that the denial of B's property right by the law of X is entitled to recognition in Y. If, according to the suggested limitation now under discussion, the mere contract under the law of X were transformed into a conveyance of the chattel under the law of Y upon the removal of the chattel to Y, on the ground that the law of Y becomes applicable for the purpose of defining the property effect of the transaction, and that under the law of Y a similar transaction would have the effect of a conveyance, the result would be that contrary to principle the law of Y would refuse to recognize A's property right retained or established under the law of X. When the law of X says that the property has not passed from A to B, it

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(f) See § 4(2), Case A(2), *infra*.

(g) This appears to be Zitelmann's doctrine, adopted by Lewald, in *Répertoire de Droit International*, vol. 7, Paris, 1930, pp. 374, 375, §§ 284 ff., and in *Das Deutsche Internationale Privatrecht*, Leipzig, 1931, pp. 187-189, §§ 248, 249; cf. Frankenstein, *Internationales Privatrecht*, vol. 2, Berlin, 1929, pp. 45, 46.

necessarily says that the property remains in A, and this ascertainment of the ownership of the chattel by the then *lex rei sitae* would seem to be as much entitled to recognition in Y as, admittedly, the title ascertained by the law of X would be entitled to recognition in Y in the converse case of the transaction being regarded by the law of X as a conveyance from A to B. It would seem also to follow that if by the law of X the transaction has the effect of transferring to B some partial or modified title, the respective property rights of A and B ascertained by the law of X are entitled to recognition in Y.

(3) *Subsequent Transaction in New Situs.*

We may next suppose that the transaction between A and B is followed by a transaction between A or B on the one part, and C, on the other, under which C claims to have acquired the property in the chattel. If at the time of both transactions the chattel is situated in the same country, the result is comparatively simple; the *lex rei sitae* governs the property effect of both transactions. If, however, the situs of the chattel is changed in the interval between the two transactions, being in X at the time of the first transaction and in Y at the time of the second transaction, the situation is more complicated. The first transaction is governed as to its property effect by the law of X, and as to its contractual effect by the proper law of the contract, and the second transaction is governed as to its property effect by the law of Y (subject to the possible modification, already discussed (*h*), in case the chattel has been removed from X to Y without the owner's consent), and is governed as to its contractual effect by the proper law of the contract. Full recognition must be given to the property effect of the second transaction under the law of Y, and if that law gives a good title to C, his title is entitled to recognition in X notwithstanding that he would not have got a good title by the law of X in the event of both transactions being governed by the law of X. In other words, a title acquired or retained under the law of X by virtue of the first transaction may be defeated or rendered nugatory under the law of Y by the second transaction. The law of X which was the governing law so long as it was the *lex rei sitae* and by virtue of its being the *lex rei sitae*, obviously must yield to the law of Y with regard to the property effect of any trans-

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(*h*) See § 2(2), *supra*.

action which has taken place since the removal of the chattel to Y (i).

The conditional sale and chattel mortgage cases afford of course the widest variety of illustration of the operation of the rules just stated, but those cases are so varied that they give rise to situations which require further subdivision and classification. They are therefore reserved for separate subsequent consideration. In the meantime an attempt will be made to illustrate the operation of the rules by other cases.

#### (4) *Particular Situations.*

##### (a) *Sale and Agreement to Sell.*

In *Cammell v. Sewell* (j), already cited, goods were shipped on a Prussian ship at a Russian port for delivery to an English firm. The ship was wrecked on the coast of Norway, and the cargo was discharged and sold by the master in Norway. It was held that the buyer got a good title by the law of Norway and therefore a title which was good in England. It appeared that even by the law of Norway the master could not, as between himself and the owners of the ship or the owners of the cargo, justify the sale, and that he remained liable to them, but as the only question in the case was the validity of the buyer's title, the contractual aspects were not further discussed, and it was not necessary to decide whether the proper law of the contract or any of the contracts with regard to the ship or the cargo was Russian, Prussian or English.

In the Ontario case of *McKenna v. Prieur and Hope* (k), already cited, a motor-car was sold by one McDermott, a dealer in second-hand cars, carrying on business at Montreal in the province of Quebec, to the defendant Hope, a dealer carrying on business at Alexandria in the province of Ontario. It transpired subsequently that the car had been stolen from the plaintiff in Rhode Island, and action was brought by him in Ontario against Hope and one Prieur to whom Hope had resold the car.

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(i) The same principle prevails, broadly speaking, in other systems of conflict of laws. See, e.g., Niboyet, *Manuel de Droit International Privé*, Paris, 1928, § 511, p. 638; Lewald, in *Répertoire de Droit International* vol. 7, Paris, 1930, p. 373, § 282, and in *Das Deutsche Internationale Privatrecht*, Leipzig, 1931, p. 185, § 247.

(j) (1860), 5 H. & N. 728. Cf. Westlake, *Private International Law*, § 151; Foote, *Private International Law* (5th ed. 1925) 446 ff.

(k) (1925), 56 O.L.R. 389, [1925] 2 D.L.R. 460.

Owing to the fact that in accordance with the agreement of the parties delivery of the car was made by McDermott in Ontario and payment made there by Hope, it is probable that under the English rule the proper law of the contract was Ontario law, but the bargain was made in Quebec and under the Restatement rule the proper law of the contract would be Quebec law. Inasmuch, however, as the plaintiff was clearly entitled to assert his title to the car under either Rhode Island or Ontario law, the only real question was whether the effect of the Quebec transaction was to negative or modify his right to assert his title, and from this property point of view the governing law would be the *lex rei sitae* and not the proper law of the contract. While only one member of the court (Smith J.A.) mentioned the applicability of the *lex rei sitae* as such, several of the judges expressed their views as to the effect of the Quebec law (in the light of the evidence of a Quebec advocate), assuming in favour of the defendants that that was the governing law. Two judges considered that under either Quebec or Ontario law the contract was intended to be executory, the title not to pass until delivery of the car in Alexandria, and consequently that Hope acquired no property right by the transaction in Quebec. The other judges discussed the effect of article 1489 of the Civil Code of Lower Canada (*l*), which states an exception to article 1487 (*m*). It being assumed that McDermott was a trader within the meaning of article 1489, the question remained whether Hope acquired any property right which he was entitled to assert against the plaintiff in Ontario. One judge held that there was no "sale" to Hope in Quebec, but merely an executory contract outside of the terms of article 1489. The Chief Justice held

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(*l*) "1489. If a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it."

(*m*) "1487. The sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles. The buyer may recover damages of the seller, if he were ignorant that the thing did not belong to the latter." In addition to article 1489, already quoted, the exceptions are: "1488. The sale is valid if it be a commercial matter, or if the seller afterwards become owner of the thing"; and "1490. If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed." Article 1488, which at first reading might seem to be important, has been held in Quebec to be limited in its effect to the parties to the sale and not to affect third parties (*Tremblay v. Mercier & Lachaine* (1909), Q.R. 38 S.C. 57). In any event article 1488 has no bearing on the case of a lost or stolen thing (specially provided for by article 1489), and it was not relied on in *McKenna v. Prieur and Hope*.

that Hope acquired no property right, but merely a possessory lien, which would have enabled him to hold the car against the plaintiff until reimbursement by the plaintiff of the amount paid by Hope to McDermott, if Hope had not lost his lien by giving possession of the car to his sub-buyer Prieur. The remaining judge (Smith J.A.) agreed with the Chief Justice that article 1489 did not operate to transfer any title to Hope, but, differing from him, held that the operation of the article was not to confer a possessory lien on Hope, but to restrain the owner from claiming his chattel till he reimbursed Hope, a restraint which was independent of possession, but unavailing against the plaintiff in Ontario (n). In other words this restraint was not a property right, and was outside the rule that the *lex rei sitae* governs the creation of real rights in a chattel.

If in the foregoing case we supposed that by the law of Quebec (the *lex rei sitae*) the buyer got a valid title, and that by the law of Ontario (the proper law of the contract) the buyer did not get a good title, the buyer's title would be entitled to recognition in Ontario. As it was, once it was established that by the *lex rei sitae* the buyer acquired no real right in the chattel, there was no difference between the laws of Ontario and Quebec as to the recognition of the title of the owner from whom the car was stolen.

It should be noted here that the effect of s. 21 of the Quebec Motor Vehicle Act, R.S.Q. 1925, c. 35, is that a person who has not obtained a license to deal in motor vehicles is not a "trader dealing in similar articles" within article 1489 (o).

(b) *Stoppage in Transitu and Dissolution.*

An interesting question is whether an unpaid seller's right of stoppage in transitu, or his right of dissolution for non-payment of the price, as the case may be, is a contractual right (*jus ad rem*) or a property right (*jus in re*). Each of these rights appears in some of the cases to have been regarded as depending on the proper law of the contract of sale rather than the *lex rei sitae*, and therefore as being contractual rather than proprietary.

As contrasted with the right of stoppage of goods in transitu given to an unpaid seller by English law in the event of the

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(n) Approved in *Phoenix Assurance Co. v. Laniel* (1926), 59 O.L.R. 55, [1926] 3 D.L.R. 301.

(o) *Home Fire and Marine Ins. Co. v. Baptist*, [1933] S.C.R. 382, [1933] 4 D.L.R. 678.

insolvency of the buyer, and recognized by the Sale of Goods Act, in force in all the common law provinces of Canada, but not part of the law of sale of goods of the province of Quebec, the Civil Code of Lower Canada contains the following articles, *inter alia*, relating to the dissolution of a contract of sale by reason of the non-payment of the price:

1538. The judgment of dissolution by reason of non-payment of the price is pronounced at once, without any delay being granted by it for the payment of the price; nevertheless the buyer may pay the price with interest and costs of suit at any time before the rendering of the judgment.

1543. In the sale of moveable things the right of dissolution by reason of non-payment of the price can only be exercised while the thing sold remains in the possession of the buyer; without prejudice to the seller's right of revendication as provided in the title of Privileges and Hypothecs. [Added by 48 Vict. c. 20, s. 1, as amended by 54 Vict. c. 39, s. 1: In cases of insolvency, such right can only be exercised during the thirty days next after the delivery.]

A comparison of the English and French versions of the articles just quoted shows that the word *dissolution* is a translation of the French word *résolution*, the use of which would seem to indicate that a sale of goods is regarded as a sale defeasible at the seller's instance upon the fulfilment of a resolutive condition or condition subsequent (namely, upon non-payment of the price), subject to the right of the buyer to pay the price, interest and costs before judgment for dissolution (*p*). The word *resiliation* also occurs, instead of *dissolution*, in some of the reported cases.

The next following cases are examples of situations arising from a change of situs from a country by the domestic law of which an unpaid seller has one of these rights to a country by the domestic law of which he has not that right; but as the contest in each case was between the law of the new situs and the law of the old situs, which was also the proper law of the contract, the cases may not be decisive of the ques-

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(*p*) It might therefore be argued that the right of dissolution is a proprietary right, but in Quebec there has been some difference of opinion on this point. See, *e.g.*, *Hart v. Goldfine, Re Rosenzweig* (1921), Q.R. 31 K.B. 558, 70 D.L.R. 174. While the common law rules as to stoppage *in transitu* do not prevail in Quebec, the seller might bring an action for dissolution of the contract and revendication of the goods, and might obtain a conservatory attachment of the goods; or, if he alone were named in the shipping contract, or if he were able to deliver up the bill of lading (or both or all the counterparts, if more than one), he might give directions to the carrier. *Acme Glove Works v. Canada Steamship Lines* (1925), Q.R. 38 K.B. 487, [1925] 4 D.L.R. 494.

tion whether the right should be characterized as contractual or proprietary.

Thus, in the Quebec case of *Rogers v. Mississippi & Dominion Steamship Co.* (q) a Quebec firm ordered goods from the plaintiffs, an English firm, who shipped them by the defendant company's steamship from Liverpool to Quebec, consigning them to the buyers and forwarding the bill of lading to them. Before the goods were delivered by the defendant to the buyers, the latter became insolvent and the plaintiffs, by notice to the defendant, stopped the goods in transit. The curators of the buyers' insolvent estate claimed the goods by virtue of article 6 of the Civil Code of Lower Canada, which provides, *inter alia*, that "the law of Lower Canada is applied wherever the question involved relates to the distinction or nature of the property, to privileges and rights of lien [*privilèges et droits de gage*, in the French version], contestations as to possession;" and contended that any right of dissolution which the plaintiffs might have had under the law of Quebec was taken away by the concluding words of article 1543: "In cases of insolvency, such right can only be exercised during the fifteen days next after the delivery." It was held, however, that "delivery" meant delivery by the carriers to the buyers (and this delivery had not taken place), and that the right of stoppage in transitu was not a lien (*droit de gage*) within the meaning of article 6, so as to be governed by Quebec law, but was a right governed by the law of England—apparently because it was the proper law of the contract—and that the plaintiffs were entitled to succeed.

Again, in *Rhode Island Locomotive Works v. South Eastern R. Co.* (r) a sale and delivery of two locomotives had been made in Rhode Island, and the seller took out an attachment in revendication in Quebec, where the locomotives then were, claiming dissolution of the sale for non-payment of the price. It was held that under article 8 of the Civil Code of Lower Canada the contract was governed by the law of the place where it was made, Rhode Island, in the absence of circumstances showing that any other law was intended to apply,

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(q) (1888), 14 Q.L.R. 99.

(r) (1886), 31 L.C.J. 86: followed in *Re Hollinger, Ex. p. Wettstein & Co.* (1927), 8 Can. Bkptcy. R. 174, 33 Rev. de Jur. 71, a case in which a seller under a contract of sale made in Switzerland, having no right of resiliation by the law of Switzerland, was held in Quebec to have no right of resiliation against the buyer, domiciled in Quebec, to whom the goods had been delivered.

and since the law of Rhode Island did not give the seller any right of dissolution or any such remedy as that of attachment in revendication the proceedings were dismissed. It was also held that article 6 did not apply so as to create, on movables brought into the province, a privilege or recourse which did not attach to them before their removal.

Again, in the Ontario case of *Re Hudson Fashion Shoppe (s)*, Quebec sellers were held entitled to exercise against an Ontario buyer a right of dissolution conferred by the law of Quebec and unknown to Ontario law. An order was taken in Ontario for certain goods, deliverable f.o.b. Montreal, the order being subject to the approval of the sellers at Montreal, a card being subsequently sent by the sellers to the buyer acknowledging receipt of the order and saying, "Same will have our prompt attention." It was held that whether the card was or was not a notification of the necessary approval by the sellers at Montreal so as to amount to an acceptance there, the delivery of the goods f.o.b. Montreal completed the contract, and that the contract was a Quebec contract. It followed that on the buyer's failure to pay and bankruptcy the sellers were entitled to dissolution, though the goods had been delivered to the buyer and therefore, if Ontario law had been the governing law, the unpaid sellers' last chance of preventing the goods going into the mass of the bankrupt's stock for the benefit of all the creditors would have been lost upon the termination of the transit. If we were to vary the facts of the case by supposing that the contract provided for delivery and payment in Ontario, the proper law of the contract would probably be Ontario law,

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(s) (1926), 58 O.L.R. 130, [1926] 1 D.L.R. 199. In the case of *Commercial Corp. Securities Ltd. v. Nichols*, [1933] 3 D.L.R. 56, (C.A. Sask.), a conditional sale of a motor car was made in Saskatchewan and the car was delivered there. On default by the buyer, the car was seized and sold in Alberta, in accordance with Saskatchewan law, but not in accordance with Alberta law. The seller then brought an action in Saskatchewan against the buyer for the deficiency. It was held that the seller was entitled to succeed, the proper law of the contract being Saskatchewan law. The situs of the car at the time of the contract of conditional sale was also Saskatchewan, but there was no suggestion in the judgments that the *lex rei sitae* as such might be applicable. It might be argued, with some force, however, that the right of action in Saskatchewan was dependent on the validity of the resale in Alberta in accordance with the *lex rei sitae* at the time of the resale, regardless of the question whether the contract of conditional sale was governed by the law of Saskatchewan as the *lex situs* or as the proper law of the contract. See my note in (1933) 11 Can. Bar Rev. 352; cf. *Determination of Law Governing Power of Redemption in Conditional Sales of Chattels* (1933), 43 Yale L.J. 323.

and, if the right of dissolution is a contractual, and not a proprietary right, the sellers would have had no remedy except to claim as ordinary creditors of the bankrupt estate, and the fact that the *lex situs* of the goods at the time of the making of the contract was Quebec would have been of no assistance to them. On the other hand, if the right of dissolution is a proprietary right, so that the buyer gets, not the property in the goods in an absolute sense, but only a modified kind of property—as the court in *Re Hudson Fashion Shoppe* seemed to think—the governing law would be the *lex situs* of the goods at the time of the contract of sale, without regard to the proper law of the contract—inconsistently with the court's decision that the proper law of the contract determined whether the sellers had a right of dissolution, but consistently with the actual result of the case, because Quebec law was both the *lex situs* and the proper law of the contract.

It is perhaps of interest to note the fact that the Ontario legislature subsequently passed a statute requiring a seller who has a right of revendication for non-payment of the price under a contract of sale made outside of Ontario to file the contract or a caution relating thereto in the same manner and within the same time after the goods are brought into Ontario as a conditional sale agreement is required to be registered (*t*). The result is of course to overrule the case of *Re Hudson Fashion Shoppe* in its particular application in the province of Ontario, without however affecting in other respects the application of the general principle of the conflict of laws which the case has been used to illustrate. Piecemeal legislation of this kind, avoiding the local application of a general rule of conflict of laws in a special kind of case is hardly to be commended. The effect of the general rule was of course to give a Quebec seller in certain circumstances a privilege which would be unavailable to an Ontario seller in like circumstances, and the true

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(*t*) Statutes of Ontario, 1929, c. 23, s. 8, amending 1927, c. 42, s. 5; *Re Meredith* (1930), 11 Can. Bkptcy. R. 405; *Re Modern Cloak Co.* (1930), 11 Can. Bkptcy. R. 442. The case of *Re Hudson Fashion Shoppe* was not followed in the Nova Scotia case of *Re Satisfaction Stores* (1930) 60 N.S.R. 357, [1929] 2 D.L.R. 435, because of a provision in the Nova Scotia statutes requiring registration in the province of a conditional sale made outside the province of a chattel subsequently brought into the province (the majority of the court—erroneously, it is submitted—being of the opinion that the effect of the right of dissolution under the Civil Code of Lower Canada is to prevent the passing of the property in the chattel until payment of the price).

remedy might be to amend the domestic law of Ontario as to an unpaid seller's rights and to adopt what even some common lawyers have considered the more just provisions of the civil law (*u*).

(c) *Intrinsic Validity.*

The Conflict of Laws Restatement says that the validity of a conveyance of a chattel alleged to be void between the parties for illegality of the transfer or illegality of the consideration or other reasons, or alleged to be voidable between the parties for fraud or other cause which affects its intrinsic validity, is determined by the law of the state where the chattel is situated at the time of conveyance (*a*). Similarly, the question whether a contract is void or voidable is determined by the proper law of the contract (*b*). If a transaction contains both contractual and property elements, theoretically the proper law and the *lex rei sitae* would respectively be applicable, but usually the property effect of the transaction would be more important than its contractual effect, and in any event the proper law of the contract would have to yield so as to allow full operation to the property effect in accordance with the *lex rei sitae*.

If a transaction is alleged to be void or voidable because entered into in fraud of creditors, practically it is only the property effect which is of importance; and even as to the contractual effect of the transaction it would appear difficult to apply a proper law ascertained by considerations personal to the parties to the transaction when the ground of alleged invalidity is the protection of the interest of third parties. At least as to the property effect of the transaction, the question is one of the validity in substance of the conveyance of a chattel

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(*u*) Cf. *Inglis v. Usherwood* (1801), 1 East 515, at p. 524, Lord Kenyon C.J., quoted in *Re Hudson Fashion Shoppe*. In *Inglis v. Usherwood* itself the unpaid seller's right to retake possession of the goods was held to be governed by Russian law, but it is not clear whether that law was applied because it was the *lex situs* of the goods when they were shipped or because it was the proper law of the contract of sale. Cf. Westlake, *Private International Law*, notes to his § 150.

(*a*) Comment (*a*) on § 257. *Quaere* whether for the present purpose, any useful distinction can be drawn between a conveyance voidable for fraud or other cause and a sale dissoluble under Quebec law by reason of non-payment of the price. See note (*p*), *supra*.

(*b*) Restatement, §§ 332(e), 347; (1904) 64 L.R.A. 827.

and is governed by the *lex situs* of the chattel at the time of conveyance (c).

(d) *Pledge and Lien.*

Westlake says (d): "Questions as to the transfer or acquisition of property in corporeal movables, or of any less extensive real rights in them, as pledge or lien, are generally to be decided by the *lex situs*."

As regards pledge, the matter is comparatively simple from the point of view of the conflict of laws. A bailment of a chattel by way of security is known to most systems of law, and, as delivery of possession is an essential part of the transaction, not only must the pledge necessarily be made in the country of the situs of the chattel, but the question of the recognition of its validity in another country is free from the difficulty which sometimes arises in the case of a chattel mortgage (e), namely, that the law of the other country may refuse to recognize the validity of a mortgage unaccompanied by delivery of possession. A pledge, at least in English law, gives the pledgee some kind of proprietary right, sometimes called a special property, in the chattel, and the case falls clearly within the general conveyancing rule and is governed by the *lex rei sitae* (f). But it has been said that the question whether a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge, those parties having a common domicile in a country different from the situs of the goods, is determined by the law of the domicile, as governing the transaction between them or as affecting title to goods admittedly belonging to one or other of them (g).

The case of a lien is not quite so simple. If what is meant is some kind of charge upon a chattel not depending on possession, the case is within the general conveyancing rule and is

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(c) Comment b on § 257 of the Restatement; (1908), 11 L.R.A. 1007.

(d) Private International Law, § 150.

(e) See § 4(2), Case A(2), *infra*.

(f) *City Bank v. Barrow* (1880), 5 App. Cas. 664; *Inglis v. Robertson*, [1898] A.C. 616.

(g) *North Western Bank v. Poynter*, [1895] A.C. 56; Westlake, Private International Law, notes following his § 150. As was pointed out in *Inglis v. Robertson*, *supra*, the goods in the *Poynter* case were part of a ship's cargo and their situs, which was said to be different from the country of domicile, was their situs only in the sense that it was the port of destination of the ship.

governed by the *lex rei sitae*, but if the lien is valid by that law without delivery of possession and if possession is not in fact given, the recognition of the validity of the lien in another country might encounter the difficulty already indicated in connection with a chattel mortgage. If what is meant is a possessory lien, that is, a right to retain possession of another person's chattel, not necessarily or usually involving any property right on the part of the lien-holder, such a right could hardly be asserted anywhere except in the country of the situs and could not be successfully asserted in defiance of the *lex rei sitae*. but it is not clear that the *lex rei sitae*, as such, should be the governing law. In the case of the lien of the repairer or improver of a chattel, the proper law of the contract between the parties would usually if not necessarily be the same as the *lex situs* of the chattel (*h*). In the case of an unpaid seller's lien under a contract of sale, however, the proper law of the contract might be different from the *lex situs* of the chattel, and it may be that the right to the lien ought to be regarded as a contractual right, governed by the proper law of the contract, not a property right, governed by the *lex rei sitae* (*i*). The Conflict of Laws Restatement, however, provides simply (§ 279) that the validity of a lien on a chattel is determined by the law of the state where the chattel is situated at the time when the lien is created.

(e) *Some Continental Views.*

The broad distinction between the contractual and the property effects of a transaction is stated clearly by Niboyet (*j*), the intrinsic validity and effect of the transaction being governed by the law appropriate to obligations as regards any *jus ad rem*, and by the *lex rei sitae* as regards any *jus in re*.

The distinction is well stated, and its consequences are briefly discussed, by Gutzwiller (*k*). As he says, the *lex rei sitae* governs all questions of real rights (*alle sachenrechtlichen Fragen*), but it governs only questions of real rights, and it does not govern the contractual effects (*die obligationenrechtlichen*

(*h*) A good example of the application of the *lex rei sitae* to a repairer's lien is *Willys-Overland Co. v. Evans* (1919), 104 Kan. 623, 180 Pac. 235, cited by Beale (1904), 33 Harv. L. Rev. 1, at pp. 15, 16.

(*i*) *Cf.* (1904), 64 L.R.A. pp. 831-832.

(*j*) Manuel de Droit International Privé, Paris, 1928 § 507, p. 635.

(*k*) Internationalprivatrecht, (in Stammer, Das gesamte deutsche Recht in systematischer Darstellung), Berlin, 1931, pp. 1593 ff.

*Wirkungen*) which result from the transaction either in the place of real effects or in addition to its real effects.

A difficulty may arise, however, as between two countries which have widely different systems of local law. When we pass beyond the case of the property *simpliciter* in a chattel, something which is recognized generally in different systems of law, we may find it difficult to apply to particular or special real rights in a chattel the rule that such rights are governed by the *lex rei sitae* and that if valid according to that law they are entitled to be recognized elsewhere. In order that a real right in a chattel created under the law of X may be effectually recognized in Y, it is necessary that there be some category of the law of Y in which the real right created under the law of X may be placed. Even though the category of the law of Y need not be identical with that of the law of X, there must be some measure of analogy between the two categories in order that the real right may be recognized in Y without doing undue violence to the legal system of Y. If the divergence between the legal systems of X and Y is so great as to preclude the recognition in Y of the right created in X, we may have an example of a rule of public policy (*ordre public*) of Y which interferes with the application of the general rule (1).

## § 4. Conditional Sales and Chattel Mortgages

### (1) General Principles.

To a certain extent conditional sale agreements and chattel mortgages may be discussed together because they produce similar situations for the present purpose. If A, the owner of a chattel, makes with B a conditional sale agreement whereby the title to the chattel is reserved to A until payment in full by B, but under which possession is given to B; or if B, the owner of a chattel, conveys it to A by way of mortgage, B retaining possession; in either case, A is the true owner of the chattel, or at least has some property in the chattel, and B is the possessor and the ostensible owner (*m*). In either case, both

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(1) Lewald, in *Répertoire de Droit International*, vol. 7, Paris, 1930, p. 373, § 281, and in *Das Deutsche Internationale Privatrecht*, Leipzig, 1931, p. 184, § 246; cf. Niboyet, *Canuel de Droit International Privé*, Paris 1928, §§ 512, 513, p. 639. The point has already been mentioned in § 3(2), *supra*; as to chattel mortgages, see also § 4(2), Case A(2), *infra*.

(m) It has been suggested that a conditional sale is in effect a completed sale with a mortgage back to secure the payment of the

in Canada and the United States, the prevailing tendency of legislation is to require some filing or recording of a document evidencing the title of A, who is not in possession, in order that that title shall not only be good against B, but also be unimpeachable at the suit of innocent third parties who deal with B on the faith of his ostensible title.

If the chattel is situated in X, and the conditional sale agreement or the chattel mortgage is made there, and the chattel is subsequently removed to Y, at least two questions of conflict of laws arise (*n*), namely, (1) whether A's title will be recognized in Y, in the absence of a subsequent dealing there with the chattel between B and a third party, C; and (2) whether, if the chattel is, in Y, sold, pledged or mortgaged by B to C, who takes without notice of A's title, A's title will be there recognized as against C.

In order to present for consideration as many situations as possible arising from the similarity or variance, as the case may be, of the laws of X and Y respectively, and to classify as far as possible the problems resulting from the removal of a chattel from X to Y, it is proposed to state (A) the case of A's title being good by the law of X, not only as against B, but also as against third parties, (B) the case of A's title being by the

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purchase price. Williston, *Sales of Goods* (2nd ed. 1924) vol. 1, §§ 304, 330, 337. But the two transactions are not always treated in the same manner. 41 Harv. L. Rev. 779, note 1. From the point of view of English law, or Anglo-American law generally, the two transactions produce essentially equivalent situations as regard the conflict of interest between A and a subsequent buyer, pledgee, or mortgagee from B, but for the purposes of conflict of laws it is important to note that some systems of law will more readily recognize the validity of a reservation of title without retention of possession than the validity of a chattel mortgage without delivery of possession. See § 4(2), Case A(2), *infra*. See also note in 81 U. of Penn. L. Rev. 628.

(*n*) See 1 Williston, *Sale of Goods* (2nd ed. 1924) 799 ff., § 339 (conditional sales); Goodrich, *Conflict of Laws* (2nd ed. 1938) 414 ff.; §§ 153, 154 (conditional sales and chattel mortgages); *Conflict of Laws as to Sale of Live Stock in one State held under Chattel Mortgage in Another* (1902), 54 Central L.J. 443; *Chattel Mortgage and Conditional Sale Recording Acts in the Conflict of Laws* (1928), 41 Harv. L. Rev. 779; *Validity of Judgments refusing Recognition to Chattel Mortgages recorded in another State* (1928), 37 Yale L.J. 966; *Conflict of Laws as to Conditional Sales*, (1904) 64 L.R.A. 833, (1912) 35 L.R.A. (N.S.) 385, L.R.A. 1917 D 944, (1923) 25 A.L.R. 153; *Conflict of Laws as to Chattel Mortgages*, (1904) 64 L.R.A. 353, (1912) 35 L.R.A. (N.S.) 385, L.R.A. 1917 D 942, (1928) 57 A.L.R. 702; *Determination of Law governing Power of Redemption in Conditional Sales of Chattels* (1933), 43 Yale L.J. 323. As to change of situs without the consent of the owner, see § 2(2), *supra*.

law of X good as against B, but impeachable by third parties, and (C) the case of A's title being either void *ab initio* by the law of X or actually avoided under that law; and in connection with each of these cases to consider various alternative hypothetical provisions of the law of Y.

No attempt will be made here to make a new review or classification of the multitude of reported cases in the United States or even of the comparatively small number of Canadian cases. All that will be attempted is to state various situations and to suggest the principles of law which ought to be applied to the conflict of interests arising from each situation, without any implication that every suggested solution could be supported by the citation of a reported case or is in accordance with the current of authority.

## (2) *Particular Situations.*

### (A) *Title Valid by Original Lex Rei Sitae.*

We suppose, in the first place, either that A, the owner of a chattel situated in X, makes there a conditional sale agreement with B, reserving the title to A until payment in full, and giving possession to B there, or that B, the owner of a chattel situate in X, conveys it there to A by way of mortgage, B retaining possession; and we suppose that by the law of X, A's title, reserved in the one case and conveyed in the other, is valid not only as against B, but also as against third parties, either because no filing is required by the law of X or because the filing requirements of the law of X have been complied with.

If we further suppose that the chattel is removed by B to Y, and that B there purports to sell, pledge or mortgage it to C, who takes for value, in good faith and without notice of A's title or B's want of title, the nature of the problems that may arise may be made clearer by a statement of possible alternative provisions of the law of Y.

On the principles already discussed (a), applicable to the conveyance of a chattel, and apart from any statute of the situs of the chattel which furnishes a rule of the conflict of laws, as distinguished from a rule of domestic law, it would seem (1) that the nature and validity of A's title under the conditional sale agreement or chattel mortgage must be governed solely by

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(a) See § 3(2)(3), *supra*.

the domestic law of X, even after the removal of the chattel to Y, and (2) that the validity and effect of a conveyance, pledge or mortgage by B to C must be governed solely by the domestic law of Y.

By way of parenthesis it should be noted that it is impossible to state the cases in which creditors are protected within the classification of cases in which subsequent purchasers, pledgees or mortgagees are protected. Creditors of B (even attaching creditors, that is, creditors who by legal process obtain a lien or charge on B's chattels) are not in the position of purchasers for value without notice from him, and as a rule stand in no better position than B (*b*) with regard to a chattel in B's possession, but owned by A, unless the law of the situs confers on them some real right in the chattel, valid against A (*c*). In other words, creditors are not entitled to claim a chattel by virtue of a rule of the *lex rei sitae* relating to dispositions by a person who is in possession of a chattel without title, but by virtue of a special rule, usually statutory, of the *lex rei sitae* relating to the protection of creditors.

We must now consider various alternative provisions of the law of Y.

A(1). The law of Y may by statute require, as to a conditional sale agreement made in X, or a chattel mortgage made in X, that, in order that the transaction shall be valid in Y as against third parties, a document evidencing the transaction be filed in Y within a specified period after the conditional seller or the mortgagee has notice of the removal of the chattel to Y (*d*); or the law of Y may even require registration within a specified period after the removal of the chattel to Y, regardless of the knowledge of the conditional seller or mortgagee.

In this case, which for convenience of reference we may call Case A(1), that is, if there is a statute in force in Y of the kind just indicated, the statute furnishes a rule of the conflict of laws applicable to the situation in question, as distinguished from the domestic law of Y relating to conditional sale agreements and chattel mortgages, or the domestic law of Y relating

(b) Cf. *Cleveland Machine Works v. Lang* (1892), 67 N.H. 348.

(c) Cf. Conflict of Laws Restatement, comment *b* on § 257, and illustrations 1 and 2 of § 260.

(d) As to conditional sale agreements, the supposed law of Y is the law in any state which has adopted the American Uniform Conditional Sales Act, or in any province which has adopted the Canadian Uniform Conditional Sales Act.

to dispositions by persons in possession of chattels but without title to them, and *cadit quaestio*. The general principles which would otherwise have applied to the situation must yield to the statute, the courts of Y being of course bound by the statute of Y (e).

Rightly or wrongly, the statute of Y settles the matter so far as a court of Y is concerned, and if the chattel is still situated in Y when any question of property rights in the chattel arises in a court of X or in a court of Z, practical necessity compels the acceptance in X or Z of the result which has been or would be reached in the court of Y. If, however, the chattel is no longer situated in Y, it does not follow that the statutory rule of the conflict of laws of Y should be applied in X or Z. On the contrary, on principle, the court of X or Z should apply its own rule of the conflict of laws, which would normally involve the application of the domestic law of Y, and the non-application of the rules of the conflict of laws of Y, as to dealings in Y with the chattel while it was situate in Y. In the United States and Canada, as between states (or provinces) in which a uniform conditional statute is enacted containing a provision for filing of a conditional sale agreement in the state (or province) to which a chattel is removed, the tendency may be to adopt the provision as a rule of the conflict of laws even in the state (or province) from which the chattel is removed (f).

A(2). The law of Y may refuse to recognize the validity of a reservation of title under a conditional sale agreement without retention of possession, or the validity of a chattel mortgage without delivery of possession.

In this case, which we may call Case A(2), that is, if there is a rule of local public policy of Y which prevents the recognition of A's title, even though acquired or retained in X, this rule prevents the normal application of principles of the conflict of laws relating to the acquisition or retention of title. But whereas in Case A(1) the statute which furnishes a rule of the conflict

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(e) For examples of the application of a statutory provision of this kind, see 1 Williston, Sales of Goods (2nd ed. 1924) 802; 25 A.L.R. 1157 ff. (conditional sales); 57 A.L.R. 722 ff. (chattel mortgages). In the absence of an express statutory provision, the majority rule in the United States is that filing is not required in the state to which the chattel is removed: *cf.* 57 A.L.R. 711 ff.

(f) It is not intended to be suggested by this statement of a possible tendency that comity or reciprocity is a justifiable basis for the application of a foreign law.

of laws is binding in Y regardless of principle, the propriety of the rule of local public policy in Case A (2) is open to discussion, and if found to be in contravention of principle should be rejected by any court which is not bound by previous decisions. The mere fact that the domestic law of Y does not, as to transactions in Y, recognize the validity of a chattel mortgage or a reservation of title unaccompanied by possession is of course not a sufficient reason why the validity of a title acquired or retained in X should not be recognized in Y. If the law of Y regards the domestic rule as a rule of public policy, a court of Y is bound by the rule, but a court of X or Z may disregard it, unless the fact of the actual situation of the chattel in Y compels the court of X or Z to accept the result of a decision of a court of Y.

Examples of a rule of public policy of the kind stated in Case A (2) may be found in the laws of France, Germany, and, possibly, Quebec (g).

A (3). The local law of Y may require filing of a conditional sale agreement if possession is given to the buyer, or of a chattel mortgage if possession is retained by the mortgagor, in order that the transaction may be valid as against third parties (h).

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(g) As to France, see Pillet, *Traité Pratique de Droit International Privé*, Paris, 1923, pp. 736-737; Niboyet, *Manuel de Droit International Privé*, Paris, 1928, § 513, pp. 639-640 (gage). As to Germany, see Lewald, in *Répertoire de Droit International*, vol. 7, Paris, 1930, p. 373, § 281, and in *Das Deutsche Internationale Privatrecht*, Leipzig, 1931, § 246, pp. 184-185.

In Quebec, as in the other provinces of Canada, the validity of a pledge depends on possession of the creditor or a third party (C.C. art. 1970), but the law of Quebec, differing from that of the other provinces, provides (*ibid.*, art. 2022) that "moveables are not susceptible of hypothecation, except as provided in the titles *Of Merchant Shipping* and *Of Bottomry and Respondentia*." A gage or chattel mortgage unaccompanied by possession is invalid (*Payenneville v. Prévost* (1916), Q.R. 25 K.B. 246; *Desjardins v. Methot* (1916), 17 Que. P.R. 454); and it would appear probable that this rule of Quebec law is so strongly held that a Quebec court would refuse to recognize the validity of such a mortgage made elsewhere upon a chattel subsequently removed to Quebec. On the other hand, Quebec law recognizes the validity of a reservation of title without retention of possession. *Bernier v. Durand* (1916) Q.R. 25 K.B. 461, 32 D.L.R. 768.

The general rule in the United States appears to be that a title validly reserved in X will be recognized in Y notwithstanding that the local law of Y as to conditional sales is different from that of X. Cf. Goodrich, *Conflict of Laws* (2nd ed. 1938) 415; 1 Williston, *Sales of Goods* (2nd ed. 1924) 800.

(h) If Y is a province of Canada or a state of the United States, its law would usually so provide.

In this case, which we may call Case A(3), the statutory provisions of the kind just stated are strictly part of the domestic law of Y; and (it being assumed that the statute does not by its terms apply to a conditional sale agreement or a chattel mortgage made in X, so as to bring the case within Case A(1), such provisions have no bearing on the question of the conflict of laws now under discussion. *Prima facie* such provisions relate only to conditional sale agreements or chattel mortgages made in Y, and this limitation of the operation of the statute is usually a necessary consequence of the requirements as to filing in the particular district in which the chattel is conditionally sold or mortgaged.

The case is a common one, and generally speaking the result is clear, namely, that A's title, validly acquired or retained under the law of X, is recognized in Y, and there being no provision of the law of Y that prevents his asserting that title in Y, a subsequent sale, pledge or mortgage by B to C is invalid (i).

A good example is the Canadian case of *Bonin v. Robertson* (j). A resident of Minnesota, owner of a span of horses situated there, mortgaged them to a bank there in the form and under the conditions required by the law of Minnesota to constitute a valid mortgage as against subsequent purchasers from the mortgagor. The mortgagor (whether with or without the mortgagee's consent does not appear) took the horses to South Edmonton, then in the North West Territories of Canada, and sold them to the plaintiff, a purchaser for value, in good faith and without notice. The horses having been afterwards seized by the defendant, a bailiff acting for the mortgagee, the plaintiff brought action in the Territorial Court. The action was dismissed, notwithstanding that the mortgage had not been filed in the registration district of Edmonton, as would have been required in the case of a chattel mortgage made there upon chattels situated there, but as was not provided for in the case of a mortgage made elsewhere on a chattel situated elsewhere. Admittedly the mortgagee had a good title to the horses when they were taken to the North West Territories, and neither at common law nor by virtue of any ordinance of the Terri-

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(i) See, e.g., Goodrich, *Conflict of Laws* (2nd ed. 1938) 414, 418; 57 A.L.R. 711 ff.

(j) (1893), 2 Terr. L.R. 21; followed in a Saskatchewan conditional sale case, *Sawyer v. Boyce* (1908), 1 Sask. L.R. 230, 8 W.L.R. 834.

tories, could the mortgagor, a person in possession with the owner's consent, but without title or with merely a limited title or right to redeem, give a good title even to an innocent purchaser.

A(4). The domestic law of Y may recognize the validity of the reservation of title by a conditional seller without either retention of possession or filing, or the validity of the conveyance to a mortgagee without either giving of possession or filing.

As we have seen, the statutory provisions of the law of Y stated in Case A(3) have no bearing on the question of the conflict of laws under discussion, and *a fortiori* the condition of the law of Y stated in the present case, which we may call Case A(4), has no bearing on that question, though that condition of the law may make the courts of Y more inclined than they would otherwise be to uphold A's title.

For example, while a mortgage of a chattel without delivery of possession is unknown to the law of Quebec, that law allows a valid reservation of title to be made without retention of possession and without filing (*k*), and therefore would have no difficulty in recognizing a reservation of title validly made under a foreign law. Thus, where the title was validly reserved in Ontario, and the buyer took the chattel to Quebec and there sold it to an innocent third party, the original seller was held entitled to revendicate the chattel in Quebec without reimbursing the second buyer (*l*).

A(5). The domestic law of Y may recognize the validity of a sale, pledge or mortgage by a person who is in possession of a chattel without title to it, in the particular circumstances.

The branch of the law of Y just stated, in what we may call Case A(5), is of course the branch of the law of Y with which we are chiefly concerned, and it is normally the only branch of the law of Y which has any bearing on the question of the conflict of laws under discussion. In other words, unless the law of Y contains, as in Case A(1), provisions for the filing in Y of a conditional sale agreement or mortgage made in X, or, as in Case A(2), a rule of local public policy which prevents the recognition of A's title, retained or acquired under the law of X, we are concerned only with the law of X, and

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(*k*) See references under Case A(2) in § 4, *supra*.

(*l*) *Williams v. Nadon* (1907), Q.R. 32 S.C. 250: a conditional sale of a piano bearing the name of the seller-manufacturer, and therefore not requiring to be filed under the Ontario statute.

not at all with the law of Y, relating to conditional sale agreements or chattel mortgages, up to the moment when B purports to sell, pledge or mortgage the chattel in Y, and then we are concerned only with the law of Y, and not at all with the law of X, relating to dispositions by a person in possession by the consent of the owner but without title.

When it is said that the validity of the transaction in Y depends solely on the law of Y, this means the law of Y as applied to the disposition made in Y by a person who has obtained possession by virtue of the transaction in X. In other words, the facts of the transaction in X may be an essential part of the case which has to be decided by the law of Y, because it may be material, in order to decide whether the disposition by B to C is valid by the law of Y, to know in what circumstances B has obtained possession.

The circumstances in which the law of Y will recognize the validity of a disposition by a possessor who is not the owner will of course differ according as Y happens to be a country, such as England, where a thief can give a good title by sale in market overt (*m*), and a person who has sold goods and who remains in possession, or a person who has bought or agreed to buy goods and who obtains possession with the consent of the seller, can give a good title by sale, pledge or other disposition to an innocent third party (*n*), or happens to be some other country the law of which is less generous to the innocent third party (*o*), or happens to be some other country which is more generous to the innocent third party or, in other words, protects purchase rather than title (*p*).

It follows that in essentially the same situation the result of the sale, pledge or mortgage made to C in Y by B, who admittedly has no title by the law which governs the property effect of the transaction between A and B (the law of X), will

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(*m*) Cf. Sale of Goods Act, 1893, s. 22, subject to the revesting of the title if the thief is prosecuted to conviction (s. 24).

(*n*) Factors Act, 1889, ss. 8, 9; Sale of Goods Act, 1893, s. 25. The statement in the text is of course not intended to be a complete statement of the cases in which by English law a person in possession of a chattel with the owner's consent can give a good title to a third party without the owner's consent. For a much fuller statement, see my *Banking and Bills of Exchange* (5th ed. 1935) 225-236.

(*o*) The law of Ontario, like that of most if not all of the other provinces of Canada, is slightly less generous, because the law of market overt is inapplicable to a sale which takes place in Ontario.

(*p*) See § 2(2), *supra*.

vary according to the degree of protection given to innocent third parties by the law which governs the property effects of the transaction between B and C (the law of Y). The difference of result is, of course, inevitable so long as different countries have different domestic systems of laws; and it is not remediable by any system of the conflict of laws, and does not affect the generality of the application of the rules of the conflict of laws already stated. There is, for example, no inconsistency from the point of view of the conflict of laws in saying that in Case A(3) the effect of the domestic law of Y as to filing conditional sales agreements or chattel mortgages has usually no bearing on the validity of A's title retained under a conditional sale agreement or acquired under a chattel mortgage made in X, even if the chattel is removed to Y, and in saying that in Case A(5) the domestic law of Y as to the validity of dispositions made by persons in possession without title is usually decisive of the validity of A's title as against C, who takes under a sale, pledge or mortgage made by B in Y. As Williston says (q), the circumstances of the case which may estop A from asserting his title as against C exist in Y, and the question whether they are sufficient to estop A must be decided by the law of Y (r).

(B) *Title Voidable by Original Lex Rei Sitae.*

(C) *Title Void by Original Lex Rei Sitae (s).*

As under heading A, we again suppose either that A, the owner of a chattel situated in X, makes there a conditional sale agreement with B, reserving the title to A until payment in full, and giving possession to B there, or that B, the owner of a chattel situate in X, conveys it there to A by way of mortgage, B retaining possession; but, differing from the cases considered under heading A, we now suppose that by the law of X,

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(q) Sales of Goods (2nd ed. 1924) vol. 1, p. 801.

(r) The learned author seems to state the cases which have been decided in favour of the innocent purchaser as inconsistent with those which have been decided in favour of the conditional seller, but it is not clear whether the difference of result is due to the application of different rules of the conflict of laws or merely to the application of different domestic rules of law.

(s) For reasons which will be apparent from the discussion which follows, headings B and C are here placed together without any intervening comment and are not followed, as heading A is, by a statement of alternative provisions of the law of the new situs. See 25 A.L.R. 1168 ff. for a collection of cases in which by the law of the original situs the conditional seller did not effectively reserve the title as against third parties.

either (B) A's title is valid as against B but, by reason of the failure to file the agreement or mortgage or otherwise, is impeachable by third parties in certain circumstances;

or (C) A's title is strictly void, that is, as against anyone A has ineffectually attempted to reserve a title or to obtain a title by way of mortgage.

We further suppose, as under heading A, that the chattel is removed by B to Y and that B there purports to sell, pledge or mortgage it to C, who takes for value, in good faith and without notice of A's title or B's want of title.

Subject to certain limitations to be mentioned presently, the cases coming under heading B would appear to resemble the cases coming under heading A rather than those coming under heading C. That is to say, if under a conditional sale by A to B or a chattel mortgage from B to A, A has a title good *inter partes* and existing, though voidable, as against third parties, it would seem to follow that A's title should be recognized in Y, and that the consideration of the validity of any subsequent transaction between B and C in Y should begin with the lack of title of B. Broadly speaking therefore the conclusions reached in cases A(1), A(2), etc., should be applicable to the parallel cases B(1), B(2), etc.

The generality of the foregoing statement must, however, be somewhat modified when we consider exactly what is meant by A's title being voidable by the law of X. If the law of X makes A's title impeachable only by subsequent purchasers, etc., in X, and his title has not in fact been impeached in X, then it is right to say that the result of the subsequent transaction in Y between B and C will be governed by the law of Y as applied to a case which has as its starting point the validity of A's title by the law of X. If, on the other hand, the law of X makes A's title impeachable by subsequent purchasers, etc., anywhere, whether in X or elsewhere, then it may happen that the subsequent transaction in Y is within the protection of the law of X, that is, that even by the law of X the subsequent transaction gives a good title to C as against A. In this event, if the question of the title arises in Y, the case would be free from the difficulty of B's lack of title, and the effect of the transaction between B and C would be governed by the ordinary domestic law of Y, as applied to a case which has as its starting point the validity of B's title. The case would in fact

be essentially similar to the cases coming under heading C, that is, cases in which A's title is void by the law of X.

Again, if a chattel is delivered by A to B in X under a conditional agreement for the purpose of resale in the ordinary course of B's business, and the law of X recognizes B's power to give a good title to C, who deals with B in the ordinary course of B's business, notwithstanding the reservation of title as between A and B, and whether the agreement is filed or not, the case is only nominally one in which A has a voidable title by the law of X. In effect, so far as resale in the ordinary course of B's business is concerned, B has an effective title, or at least an effective power to transfer the title, and, except in the unlikely contingency that the law of X limits its protection to persons who buy from B in X, the case would in substance resemble the cases coming under heading C, and not those coming under heading B. In the event of a subsequent transaction between B and C in Y no difficulty arises by reason of B's lack of title.

Again, if A's title, originally voidable by the law of X, has been declared void before the transaction between B and C in Y, the case would come under heading C rather than heading B. Clearly so, as regards A's title; but if A's title has been declared void at the instance of B's creditors or a buyer, pledgee or mortgagee from B, there would probably be little interest in the chattel left which might be the subject of any subsequent transaction in Y between B and C.

In addition to the cases just mentioned of a title originally voidable by the law of X, but in effect void as regards a subsequent transaction in Y, we may imagine cases of title originally void by the law of X, that is, cases strictly coming under heading C.

If the law of X refuses to recognize, even *inter partes*, the validity of a reservation of title under a conditional sale agreement without retention of possession, or the validity of a chattel mortgage without delivery of possession, we have the converse of Case A (2), already discussed, in which we supposed the law of Y to be as just stated, as applied to a case of a chattel removed to Y by B, and there made the subject of a transaction between B and C notwithstanding that A had previously validly reserved or obtained a title in X. If it is the law of X which refuses to recognize the validity of A's title, the case is comparatively simple. B, having the title by the law of X, may remove it to

Y and there deal with it in accordance with the domestic law of Y.

So, if the law of X makes absolutely void (*t*) a conditional sale agreement unless there is either retention of possession of the chattel by the seller or filing of the agreement, or chattel mortgage unless there is either delivery of possession of the chattel or filing of the mortgage, and if the provisions of the law are not complied with, we have another comparatively simple case, in which B may remove the chattel to Y and there deal with it in accordance with the domestic law of Y.

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(*t*) Conditional sale and chattel mortgage statutes sometimes use the word "void," but they are usually construed as making transactions merely voidable.

## CHAPTER XX.

### SITUS AND TRANSFER OF INTANGIBLES\*

- § 1. Things and the situs of things, p. 415.
- § 2. Obligations to pay money
  - (a) General rules, p. 418.
  - (b) Negotiable instruments, p. 418.
  - (c) Quasi-negotiable instruments, p. 419.
  - (d) Specialties, p. 420.
  - (e) Other choses in action, p. 421.
- § 3. Shares and share certificates, p. 426.

#### § 1. Things and the Situs of Things.

The question what is the situs of a thing is important for various purposes, as, for example:

(1) in order to determine whether the thing or an interest in the thing is an asset of the estate of a deceased person belonging to the local administration of the estate within a given country;

(2) in order to determine whether the thing or an interest in the thing is the subject of a tax imposed on things within the territory of the taxing legislature; or

(3) in order to determine whether the thing or an interest in the thing has been validly transferred *inter vivos* in accordance with the *lex rei sitae*, so far as that law is the governing law.

The significance of situs for the first of these purposes is discussed in other chapters (*a*). In the case of interests in land, the *lex rei sitae* is the governing law not only with regard to administration of estates, but also with regard to succession on death, subject to exceptions discussed later (*b*).

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\*This chapter reproduces in a revised form an article, bearing the same title, published (1935), 13 Canadian Bar Review 265-278, subsequently incorporated in my *Banking and Bills of Exchange* (5th edition, 1935) 41-55.

(a) See chapter 22, § 1, with especial reference to interests in land; as to movables and intangibles see chapter 32.

(b) See chapter 22, § 2.

As regards the significance of situs for the second of the purposes above mentioned, any detailed discussion is outside the scope of the present book, and the discussion of taxation cases is limited to cases that afford useful analogies in the solution of conflict problems. Some taxation cases involve questions of situs and are useful in the conflict of laws, but occasionally they are misleading when they are used in conflict cases, as if the concept of situs must be identical for taxation purposes and for conflict purposes (c). In taxing statutes and in taxation cases it is usual to speak of the situs of "property" and a tax on "property." It is accurate enough to speak of a tax on "property" in the sense of a tax on a person's property or interest in a thing, but, as is pointed out below, it is not accurate to speak of the situs of "property" in the same sense of the word "property," because it is only the thing, and not the property or interest in the thing, that can have a situs.

As regards the transfer *inter vivos* of tangible things (d), whether movable or immovable, it is clear that the domicile of the owner is immaterial and that the governing law is the *lex rei sitae* (e). As regards the transfer *inter vivos* of intangible things the applicability of the *lex rei sitae* is complicated by various considerations relating to different kinds of intangibles, and the subject has therefore been reserved for separate discussion below, but in any event the domicile of the owner is immaterial. Similarly for the purposes of provincial taxation upon "property" within the province, and for the purpose of the administration of the estate of a deceased person (f), the situs of the thing and not the domicile of the deceased owner is the dominant element, and the domicile of the owner has no bearing on the question of the situs of the thing.

A thing must be distinguished from an interest in a thing. Even if the subject of the interest is a tangible thing, a physical object, a person's interest in the thing is itself an intangible legal concept, having no actual existence and no actual situs. If the subject of the interest is itself a so-called intangible thing, then the thing, like the interest in the thing, is merely a legal concept. Things may therefore be classified as, (1) tangible

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(c) See, e.g., chapter 26.

(d) The transfer of ships may be governed by special rules. See, e.g., Dicey, *Conflict of Laws* (5th ed. 1932), appendix, note 29.

(e) As to personal chattels (movables), see chapter 19. As to land, see chapter 30.

(f) See chapter 22, § 1.

things, which may be either (a) movable or (b) immovable, and (2) intangible things. This classification is accurate in so far as it excludes intangibles from the category of movable things, although they are frequently spoken of or thought of as being movable (*g*).

The classification is, however, unreal in the sense that the description of an intangible legal concept (such as a chose in action or the goodwill of a business) as a "thing" involves the reification or "thingifying" of what does not exist in the same way as a tangible thing exists, but merely exists in the eye of the law (*h*). As the intangible thing has no objective existence, it cannot have a real situs, that is, it is not situated in a given place in the literal sense in which a tangible thing is so situated. It is common practice, however, to speak of the situs of an intangible thing and to express rules of law, including conflict rules, with regard to intangibles, in terms of situs. Language of this kind is of course not to be taken too seriously, because a so-called situs attributed to an intangible thing is obviously a less substantial basis for resort to the *lex rei sitae* than the actual situs of a tangible thing, and it may be that in the case of intangibles the statement that the *lex rei sitae* is the law governing their transfer is merely a mode of expressing a result reached or justifiable for other reasons (*i*).

Subject to the foregoing observations, it seems desirable or inevitable to adopt conventional language and to discuss in terms of situs conflict rules relating to intangibles. It must be borne in mind that the attribution of a situs to an intangible thing, at least in some cases, is based on substantial considerations (*j*), or on some principle or coherent system of principles (*k*). Situs is perhaps a useful concept indicating the centre of gravity of the intangible, or, in Savigny's language, the seat (*Sitz*) of the legal relation. Inasmuch as different kinds of

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(*g*) See chapter 21, § 1.

(*h*) As Cook, *Logical and Legal Bases of the Conflict of Laws* (1942), in the course of an acute discussion of intangibles (pp. 284 ff.), says, at p. 299, the "intangible things which exist in fact apart from law" of the Conflict of Laws Restatement, § 212, "have no more real existence than unicorns or griffins."

(*i*) Cf. Cook, *op. cit.*, p. 300.

(*j*) As, e.g., when an intangible thing is said to be situated where it can be effectively dealt with: *Brassard v. Smith*, [1925] A.C. 371, [1925] 1 D.L.R. 528. As to this case, see § 3, *infra*.

(*k*) *The King v. National Trust Co.*, [1933] S.C.R. 670, [1933] 4 D.L.R. 465.

intangibles have to be separately discussed so far as their transfer *inter vivos* is concerned, and they must be classified for that purpose, it seems better to discuss the question of the situs to be attributed to each class of intangibles as that class comes up for discussion in the following sections of the present chapter.

## § 2. Obligations to Pay Money.

### (a) General Rules

The most commonly cited general rules are that although a debt has no absolute local existence, yet it possesses an attribute of locality, and that a simple contract debt is regarded as being situated in the country in which the debtor for the time being resides, where the assets to satisfy the debt presumably are (*l*), whereas a specialty debt is said to have a species of corporeal existence by which its locality may be reduced to a certainty, and is regarded as being situated where the specialty is found at the material time (*m*). A judgment debt is said to be situated where the judgment is recorded (*n*). A specialty within the general rule includes not only an instrument under seal, but also a statutory government obligation evidenced by a bond authenticated by the legislature and charged by statute on the consolidated revenue fund (*o*).

### (b) Negotiable Instruments

An exception to the general rule as to a simple contract debt exists in the case of a debt embodied in a negotiable instrument, though not a specialty. Such a debt is regarded as being situated where the instrument is found at the material time, the instrument being regarded as analogous either to a specialty or to a tangible thing (*p*). While either the specialty character or the negotiable character of an instrument is sufficient justification

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(*l*) See, further, under heading (e), *infra*.

(*m*) *Commissioner of Stamps v. Hope*, [1891] A.C. 476. As to a debt secured by mortgage of land, see further under heading (d), *infra*.

(*n*) *Attorney-General v. Bouwens* (1838), 8 M. & W. 171, at p. 191.

(*o*) *Royal Trust Co. v. Attorney-General for Alberta*, [1930] A.C. 144, [1930] 1 D.L.R. 868, [1929] 3 W.W.R. 633; applied in special circumstances to the bonds in question in *The King v. National Trust Co.*, [1933] S.C.R. 670, [1933] 4 D.L.R. 670.

(*p*) *Attorney-General v. Bouwens*, *supra*; *Crosby v. Prescott*, [1923] S.C.R. 446, [1923] 2 D.L.R. 937, [1923] 2 W.W.R. 569; *The King v. National Trust Co.*, *supra*.

for the attribution to the debt of a situs identical with that of the actual situs of the instrument, the negotiable character of the instrument is more important than its specialty character for the purpose of its transfer *inter vivos* in the conflict of laws.

In the case of a debt which is represented or evidenced by a negotiable instrument, whether a specialty or not, as, for example, a bill, cheque or note, or a bearer bond, or a bearer interest coupon attached to a registered bond, or a bond payable to the order of a named person and not containing any provision making registration necessary on transfer, the debt is in effect merged in the instrument which represents or evidences it (*q*), and the situs of the debt is the same as that of the instrument. There is consequently no difficulty in attributing a situs to the intangible debt for any purpose for which the attribution of a situs is important, as, for example, for the purpose of the administration of the estate of a deceased person or for the purpose of provincial taxation; and furthermore there is no difficulty in applying the *lex situs* of the instrument as the law governing the transfer *inter vivos* of the instrument and the debt (*r*). The question whether an instrument has the quality of negotiability is governed by the *lex rei sitae* at the time of transfer (*s*).

### (c) *Quasi-negotiable Instruments*

A more complicated case is that of a debt represented or evidenced by an instrument which for convenience may be called a quasi-negotiable instrument, namely, an instrument which is customarily transferable by endorsement or endorsed transfer and delivery, but which must be surrendered and the transfer of which must be registered in order to effect a complete transfer of the debt. Bonds registered in the name of a specified person frequently contain terms which bring them into this class of instruments (*t*). Even if an instrument of this class is

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(*q*) La créance fait corps avec le titre et sa nature incorporelle, ainsi matérialisée, cesse de créer un obstacle à une livraison de main à main. *Pesant v. Pesant*, [1934] S.C.R. 249, at p. 265.

(*r*) As to the transfer of negotiable instruments in the conflict of laws, see chapter 14, § 4.

(*s*) *Pieker v. London and County Banking Co.*, (1887), 18 Q.B.D. 515; *Colonial Bank v. Cady*, (1890), 15 App. Cas. 267; *Garey v. Dominion Manufacturers* (1924), 56 O.L.R. 159, [1925] 1 D.L.R. 99.

(*t*) Cf. Steffen and Russell, *The Negotiability of Corporate Bonds* (1932), 41 Yale L.J. 799, and *Registered Bonds and Negotiability* (1934), 47 Harv. L. Rev. 741.

a specialty, as it usually is, so as to justify the attribution to the debt of a situs at the place where the instrument is found, the debt is not merged in the instrument so as to justify our saying that the transfer of the instrument is exactly equivalent to the transfer of the debt. The transfer *inter vivos* of the instrument is of course governed by the *lex rei sitae* at the time of the transfer, while the transfer of the debt is governed by the law of the place of registration. In practice, however, the requirements of the law of the place of registration are usually purely routine or ministerial, so that in effect the purchaser of the instrument, who acquires the property in the instrument by its transfer to him, usually acquires also the right to procure the registration of the transfer and the consequent registration of himself as holder of the instrument. This right is nearly though not exactly equivalent to the legal title to the debt which he acquires when the transfer is registered. Technically, until the transfer is registered, he may be said to have, as regards the debt, a *jus ad rem* rather than a *jus in re* (*u*).

#### (d) *Specialties*

If a debt is represented or evidenced by a specialty, it is said to have a situs where the specialty is found at the material time (*a*), and this situs is an essential element for the purpose of the administration of the estate of the deceased owner and for the purpose of making the debt the subject of taxation under a provincial statute imposing a tax on property (*b*). It does not follow, however, that the situs thus attributed to a specialty debt is the connecting factor in the conflict of laws with regard to the transfer *inter vivos* of the debt. If the instrument is strictly speaking negotiable, it falls under heading (*b*) above, and the transfer of the instrument and of the debt is governed by the *lex situs* of the instrument at the time of the transfer. If the instrument is quasi-negotiable in the sense explained under heading (*c*), above, the transfer of the instrument and the transfer of the debt are governed by the prin-

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(*u*) As to the similar situation with regard to the transfer of a share certificate, see § 3, *infra*, and *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, at p. 277, Lord Watson.

(*a*) As to the general rule, and as to what "specialty" includes, see heading (*a*), *supra*.

(*b*) *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, 46 D.L.R. 318, [1919] 2 W.W.R. 354; cf. *Schmidt v. Provincial Treasurer of Alberta*, [1935] 4 D.L.R. 752, [1935] 3 W.W.R. 498 (Alta.).

ciples there stated. If, on the other hand, the instrument is not negotiable even in the limited sense just mentioned, then the situs attributed to the debt by reason of the specialty character of the instrument has no significance for the purpose of the transfer *inter vivos* of the debt. A mortgage of land is the commonest example of an instrument of this class. It is usually under seal, and even if, as in the case of a charge or mortgage under the land titles system, it need not be under seal, it may, by virtue of the governing statute, have the same effect as if it were under seal. A mortgage is, however, usually made in duplicate, one counterpart being registered in the registration district in which the land is situated, and the other counterpart being held by the mortgagee; and if the mortgagee's counterpart is found at the material time in a country different from that in which the land is situated, it is impossible to apply the general rule as to the situs of a specialty debt. Consequently recourse must be had to some other criterion of situs, and practical considerations point to the situs of the land as the locality of the debt (c). In any event the mortgage security, although regarded as personal property in domestic English law, creates an interest in land, and therefore in English conflict laws its transfer is governed by the *lex situs* of the mortgaged land. Furthermore, as the mortgagee must reconvey the land or discharge the mortgage when the mortgage debt is paid, the debt cannot be effectually transferred apart from the transfer of the security, so that the transfer of the debt is also governed by the *lex situs* of the land (d).

#### (e) Other Choses in Action

There remain for discussion questions as to the situs and transfer of a debt or obligation to pay money not falling within any of the above mentioned classes. Such a debt may conveniently, though not accurately, be designated in the subsequent discussion as a chose in action (e) or a simple contract

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(c) *Toronto General Trusts Corporation v. The King*, *supra*; cf. *Royal Trust Company v. Provincial Secretary-Treasurer of New Brunswick*, [1925] S.C.R. 94, [1925] 2 D.L.R. 49. Any implication drawn from these taxation cases that a mortgage on land is a movable must be disregarded in the conflict of laws: see chapter 26.

(d) *In re Hoyles, Row v. Jagg*, [1911] 1 Ch. 173. For further discussion of this case, see chapter 21, § 2, and chapter 26.

(e) Generally as to the transfer of immovables (that is, interests in land) in the conflict of laws, see chapter 30.

(e) The expression in itself is of course wide enough to include the various kinds of intangibles already discussed.

debt (*f*). While the general rule, already mentioned, is that a simple contract debt (*g*) is situated in the country in which the debtor resides at the material time, because it is there that the assets to satisfy the debt presumably are and that the debt can be recovered (*h*), the application of the general rule is sometimes complicated by the fact that the debtor resides in effect in two or more countries. A corporation, for example, may carry on business and have offices in several countries, and in order to decide which of the several residences of the debtor is the criterion of locality of a particular debt, it is necessary to look at the contract which creates the debt. If under that contract the debt is payable or recoverable at the office of the company in a particular country, the debt is to be considered as being situated in that country (*i*). A bank is entitled to refuse to pay a cheque at any branch other than the one upon which it is drawn and at which the drawer has his account (*j*), and a customer is not entitled to require payment at one branch of money at his credit at another branch, at least in the absence of sufficient previous notice to the latter branch requiring it to transfer or remit the money to the former (*k*).

In *The King v. Lovitt* (*l*) the question was whether the province of New Brunswick was entitled to succession duty upon money on deposit in a branch at St. John, New Brunswick, of a bank having its head office at London, England, the domicile of the deceased depositor having been in Nova Scotia. It was argued that the situs of this simple contract debt was either at the residence of the debtor, that is, in England, or that of the creditor, that is, in Nova Scotia, and that the debt was there-

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(*f*) The expression in itself includes of course the case of a negotiable instrument, not a specialty, already discussed, and may not be wide enough to cover every kind of obligation to pay money included in the subsequent discussion.

(*g*) Whether a debt is a simple contract debt is determined by the *lex rei sitae*: *Attorney-General for Ontario v. Fasken*, [1935] O.R. 288, [1935] 3 D.L.R. 100.

(*h*) *Attorney-General v. Bouwens* (1838) 4 M. & W. 171; *Commissioner of Stamps v. Hope*, [1891] A.C. 467; *Sutherland v. Administrator of German Property*, [1934] 1 K.B. 423.

(*i*) *New York Life Insurance Co. v. Public Trustee*, [1924] 2 Ch. 101, and cases there cited; *In re Russian Bank for Foreign Trade*, [1933] Ch. 745; *In re Russo-Asiatic Bank*, [1934] Ch. 745.

(*j*) *Woodland v. Fear* (1857), 7 E. & B. 519; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325.

(*k*) *Clare v. Dresdner Bank*, [1915] 2 K.B. 576.

(*l*) [1912] A.C. 212.

fore situated outside of the province of New Brunswick. The Privy Council held that the debt was primarily payable at St. John, and that it had a situs within the province of New Brunswick. The statute in question purported to make all property situate within the province liable to succession duty, whether the deceased owner was domiciled there or not, such duty being assimilated by other provisions of the statute to a probate duty payable for local administration. The money on deposit was therefore held to be liable to the duty.

From a later case (*m*) it would appear that the situs of the bank's debt or obligation to its customer is not necessarily the same as the situs of the asset consisting of the money deposited. The fact being that a certain branch bank retained out of the deposits there made only sufficient money for its local business and transmitted the surplus to the head office or to another branch, the court was divided on the question whether the municipality within which the first mentioned branch was situated was entitled to tax the bank on the basis of the gross amount deposited at that branch, as being personal property within the municipality.

The situs of a simple contract debt or chose in action, ascertained on the principles just stated, is the governing element for the purpose of the administration of the estate of a deceased person and for the purpose of provincial taxation on property, but the question of the transfer *inter vivos* of the debt or chose in action is in a state of doubt or confusion in English conflict of laws (*n*). The nature of the problem may be clarified if we begin by distinguishing clearly between (a) the transaction which gives rise to the debt and (b) the transaction by which the debt is transferred from the creditor to a third person. The validity of the creditor's claim against the debtor and generally the rights and obligations of creditor and debtor *inter se* are governed by the ordinary principles of conflict of laws applicable to transaction (a), that is, in the case of a contract, by the proper law of the contract (*o*). The selection of the proper law relating to transaction (b), that is, the transferring transaction, is more difficult, and depends on the way in

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(*m*) *The King v. Assessors of Rates and Taxes for Woodstock*, [1924] S.C.R. 457, [1924] 4 D.L.R. 169.

(*n*) See the various judgments in *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 699, affirming, in the result, Greer J., (1926), 95 L.J.K.B. 955, 42 T.L.R. 625.

(*o*) As to the proper law of a contract, see chapter 14, § 5(a).

which transaction (b) is characterized in its relation to transaction (a). Three possible modes of characterization suggest themselves, and in connection with the outline which follows here the consequences of each mode of characterization are indicated.

(1) The debt arising out of transaction (a) might be characterized as a thing having a situs of its own, and transaction (b) might be characterized as being sufficiently analogous to the transfer of a tangible thing to justify the application of the ordinary rule that the *lex rei sitae* governs the transfer of the thing; and the proper law of transaction (a) would be immaterial.

(2) Transaction (b) might be characterized as being merely incidental or ancillary to transaction (a), with the result that the transfer of the debt would be governed by whatever is the proper law of the transaction which gives rise to the debt; and the situs of the debt, so far as it has a situs at all, would be immaterial.

(3) Transaction (b) might be characterized as being analogous to a contract, or at least as having a proper law of its own ascertained in a way similar to that in which the proper law of a contract is ascertained, without regard to the situs, if any, of the debt and without regard to the proper law of transaction (a).

The first mode of characterizing the transfer and the thing transferred is attractively simple, and has substantial advantages. It results in the application of a single law (the *lex situs* of the debt) to the validity of one transfer or several transfers, no matter where or by whom it or they may be made, and in particular avoids any problem of priorities as between transfers made in different countries. If it should happen that the debtor's obligation under transaction (a) is governed by some law other than the *lex situs* of the debt, he is of course still entitled to avail himself of the proper law of transaction (a) as regards the nature of the obligation, and in any action against him to recover the debt he is of course entitled to avail himself of the rules of procedure of the forum (*p*). As a general rule

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(p) Generally, as to the first mode of characterization, see Dicey, *Conflict of Laws* (5th ed. 1932) rule 153; Westlake, *Private International Law*, § 152 (analogy of the forum for the recovery of a debt with the situs of a corporeal movable); *In re Maudslay, Sons & Field, Maudslay v. Maudslay*, [1900] 1 Ch. 602, at p. 610; *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 699, Lawrence L.J., approved by

the place of action would be the same as the situs of the debt.

The second mode of characterizing transaction (b) in its relation to transaction (a) is peculiarly appropriate to some cases in which transaction (b) is in effect the exercise of a power conferred by transaction (a), as, for example, a power conferred by an insurance policy or by its proper law to nominate a new beneficiary (*q*), or a power of appointment (*r*). Even as applied to the simple case of the transfer of a debt, the second mode of characterization has some advantages (*s*). Like the first mode of characterization, it avoids any problem of priorities as between two or more transfers because, as in the case of the first characterization, both or all the transfers are governed by a single law. Unlike the first mode of characterization, the second mode of characterization avoids any possible conflict between the rights and obligations of the creditor and debtor *inter se* on the one hand, and the rights of the transferee or transferees on the other hand, because they are both governed by the proper law of the transaction which gives rise to the debt.

The third mode of characterizing transaction (b), namely, attributing to the transfer of a debt a proper law of its own, would seem to be the least satisfactory, although it appears to be the mode preferred by some judges (*t*). Like the first mode of characterization, but unlike the second, it may make applicable to the transfer of a debt a law different from the proper law of the transaction which gives rise to the debt, and it involves all the usual problems which arise in connection with contract, such as those relating to capacity, formal validity and intrinsic validity. It raises also a difficulty which is absent in the case of either the first or the second mode of characterization, namely, that there may be two or more transfers of the same debt made in different countries, and that each transfer may be

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F.P. (1927), 43 L.Q. Rev. 296; *cf.* note (1927), 40 Harv. L. Rev. 989; *Re Sawtell, Ex parte Bank of Montreal*, [1933] O.R. 295, [1933] 2 D.L.R. 392.

(*q*) *Cf. Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, 28 D.L.R. 424.

(*r*) The case of *In re Anziani, Herbert v. Christopherson*, [1930] 1 Ch. 407, might well have been, but was not, decided on this ground.

(*s*) It is approved by Cheshire (1935), 51 L.Q. Rev. 76, at p. 85; *Private International Law* (2nd ed. 1938) 444 ff.

(*t*) *Lee v. Abdy* (1886), 17 Q.B.D. 309; *Republica de Guatemala v. Nunez* (1926), 95 L.J.K.B. 955, 42 T.L.R. 625, Greer J., and [1927] 1 K.B. 699, Scrutton L.J.; *In re Anziani, supra*, Maugham J.

valid by its own proper law, and may be entitled to priority by that law (*u*). In a case like this it is obvious that resort must be had to some one law to decide the question of priorities. If, for example, the debtor resides in country X, and the debt is transferred by the creditor, in country Y to one person and in country Z to another person, the only practicable solution would seem to be to apply the *lex fori* as such, or to apply either the *lex situs* of the debt or the proper law of the transaction giving rise to the debt. If both transfers happen to be made in one country other than that of the forum, the law common to the two transfers might be applied (*v*).

### § 3. Shares and Share Certificates.

On the principle that an intangible thing may be considered as being situated where it can be effectively dealt with, it has been held, for the purpose of a tax imposed on "property," that so far as shares can have a situs, that situs is the place where the share registry is. Thus, in *Brassard v. Smith* (*a*) certain shares of the Royal Bank of Canada were in question, the bank having its head office in the province of Quebec, and the shares being part of the estate of a person who was domiciled in the province of Nova Scotia and being registered in the share registry maintained by the bank in Nova Scotia pursuant to the provisions of the Bank Act (*b*). An action having been brought by the collector of succession duty under the Quebec Succession Duty Act for payment of duty in respect of the shares, as being property "actually situate within the province", and it being assumed that shares can have a local situation, it was held that the shares were not situated in Quebec, as the

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(*u*) Cf. *Kelly v. Selwyn*, [1905] 2 Ch. 117. In this case the second transfer, made in England, of a trust fund administered by trustees in England was held in England to be entitled to priority by virtue of prior notice to the trustees, although by the law of New York, where the first transfer was made, transfers ranked in order of time of making without regard to the time of notice to the trustees.

(*v*) In *Republica de Guatemala v. Nunez*, *supra*, the two transfers were made in Guatemala and the parties to both transfers were domiciled there and the law of Guatemala was applied. Bankes L.J. held that the question was one of priorities, but this view seems hardly tenable, inasmuch as both transfers were held to be invalid; cf. F.P. (1927), 43 L.Q. Rev. 296.

(*a*) [1925] A.C. 371, [1925] 1 D.L.R. 528, affirming *Smith v. Levesque*, [1923] S.C.R. 578, [1923] 3 D.L.R. 1057.

(*b*) Section 43, corresponding with s. 42 of the present Bank Act, Statutes of Canada, 1944, c. 30.

ownership of the shares could be dealt with effectively only in Nova Scotia (c). Similarly, if a bank maintains a share registry in New York, or elsewhere outside of Canada, shares belonging to shareholders resident outside of Canada and registered in such registry are considered as having a situs at the place where the registry is (d). The principle that shares have a situs where the registry is applies not only to book stock, such as Canadian bank shares, but also to shares represented by certificates the surrender of which is required as a condition precedent to the transfer of the shares in the registry (e).

In the case of banks governed by the Canadian Bank Act the situation is relatively simple because at a given time a particular share is registered in a particular registry, and a transfer of the share must be registered there. In the case of other corporations it is not uncommon, however, for provision to be made for the registration of transfers of shares in any one of two or more registries maintained in different provinces or countries. These multiple share registries situations have given rise to many Canadian judicial decisions relating to the situs of shares for the purpose of provincial taxation and the question what tests should be used for the ascertainment of situs (as, for example, situs of the share certificate, domicile or residence of parties), in the absence of the clear test furnished by the existence of a single registry. In the latest decision of the Privy Council the test adopted for localizing the shares at one registry rather than another is to consider at which of the registries the transfer of the shares would in the ordinary course of business be registered. As it is not certain to what extent the tests adopted for the purpose of taxation are identical with the tests that should be adopted for the purpose of the conflict of laws, the further discussion of these taxation cases may be

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(c) It had already been decided, in *Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 Can. S.C.R. 570, 47 D.L.R. 108, that the same shares were the subject of taxation under the Nova Scotia Succession Duties Act. While the result is in accord with *Brassard v. Smith*, the view expressed in the judgments that the situs depends on the domicile of the deceased owner would seem to be no longer tenable; cf. *Untermeyer Estate v. Attorney-General for British Columbia*, [1929] S.C.R. 84, [1929] 1 D.L.R. 315.

(d) *The King v. Cutting*, [1932] S.C.R. 410, [1932] 3 D.L.R. 273; cf. *Re Macfarlane*, [1933] O.R. 44, [1933] 1 D.L.R. 345.

(e) *Erie Beach Co. v. Attorney-General for Ontario*, [1930] A.C. 161, [1930] 1 D.L.R. 859, affirming (1929), 63 O.L.R. 469, [1929] 2 D.L.R. 754.

regarded as outside the scope of the present book, and I merely give in the footnote (f) references to some of the cases.

For the purpose of transfer *inter vivos* in the conflict of laws it is necessary to distinguish book stock from other shares. In the case of book stock, there being no certificate that is significant in the sense that its production is essential to the transfer of the shares, only the situs of the shares need be considered. If there is a single share registry, the shares are situated in the place of the registry, and the transfer of the shares *inter vivos* is governed by the law of that place. If there are two or more share registries, some additional or other test or tests must be adopted for the attribution of a situs to the shares.

In the case of shares which are represented by a certificate which must be surrendered in order that the transfer of the shares may be registered on the books of the company, it may be necessary to distinguish between the situs of the certificate and that of the shares. On principle the transfer of the certificate is governed by the *lex situs* of the certificate at the material time, and the transfer of the shares is governed by the *lex situs* of the shares, and consequently, if the certificate is transferred in country X, and the share registry is situated in country Y, the law of X may give to the transferee of the certificate the property in the certificate (*jus in re*) and a right to registration as shareholder (*jus ad rem*), but the enforcement of his right to registration as shareholder and the vesting in him of the title to the shares (*jus in re*) are subject to the law of Y (g). It may happen that the certificate is of a kind which is customarily sold and bought in the markets of both X and Y, and

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(f) For a good discussion of the matter, see Laskin, *Taxation and Situs: Company Shares* (1941), 19 Can. Bar Rev. 617; cf. subsequent case comments (1942), 20 Can. Bar Rev. 471, 640, (1944), 22 Can. Bar Rev. 838. These subsequent comments include a discussion of *The King v. Williams*, [1942] A.C. 541, [1942] 3 D.L.R., [1942] 2 W.W.R. 321, on appeal to the Privy Council from a judgment of the Court of Appeal for Ontario. Other decisions of the Court of Appeal for Ontario are *Treasurer of Ontario v. Blondé*, [1941] O.R. 227, [1941] 3 D.L.R. 225; *The King v. Globe Indemnity Co. of Canada*, [1945] O.R. 190, [1945] 2 D.L.R. 25; *Maxwell v. The King*, [1945] O.R. 204, [1945] 2 D.L.R. 35; and *Re Aberdein Estate*, [1945] O.R. 206, [1945] 2 D.L.R. 37. Two of these decisions were the subject of appeals to the Privy Council, and the appeals were dismissed on the 10th October, 1946, *sub nom. Attorney-General for Ontario v. Blonde, and Attorney-General for Ontario v. Aberdein*, [1946] 4 D.L.R. 785 (with editorial note), [1946] 3 W.W.R. 683.

(g) See *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, at p. 277; Cheshire, *Private International Law* (2nd ed. 1938) 467.

that the purchaser in X gets not only a title to the certificate, but also, by reason of the fact that the registration requirements of the law of Y are ministerial or routine in character, gets a right to registration as shareholder by the law of Y, so that for practical purposes, by the transfer of the certificate in X he acquires something which is substantially, though not exactly, equivalent to the title to the shares. Whether this is the result of the transfer of the certificate may, however, depend in particular circumstances upon special considerations relating to the nature of share certificates.

A share certificate of the kind now under discussion is not, strictly speaking, a negotiable instrument, that is, it is not negotiable in the same sense that a bill, cheque, note or bearer bond may be negotiable, and the shares are not merged in the certificate in the same way that a debt may be merged in a negotiable instrument, even though the certificate may be customarily sold and bought in the market. It may therefore happen that the transferee of a negotiable instrument would acquire a good title, although the transferee of a share certificate would not in similar circumstances acquire a good title, as against the former holder who did not intend to transfer the title or did not authorize its transfer.

A person taking share certificates for value without notice of any infirmity in the title would not in all circumstances be entitled to hold them as against a prior owner who had never intended to part with the property in them. If there has been no intent on the part of the owner to transfer them a good title can be obtained against him only if he has so acted as to estop himself from setting up a claim to them (*h*), or if he has delivered them to an agent with some authority to sell or pledge, and they are in such condition that they may be transferred by the agent without any warning to a third party that the transfer by the agent is made in excess of the agent's authority, and has therefore conferred upon the agent a power to sell or pledge to a person who takes without notice of the limitations of the authority. Thus, in *Colonial Bank v. Cady* (*i*), after the death of a person who was the holder of certificates which stated that he was the owner of shares and that the shares were transferable only on the books of the company on sur-

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(*h*) *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, at p. 283; *Mathers v. Royal Bank of Canada* (1913), 29 O.L.R. 141, 14 D.L.R. 27.

(*i*) (1890), 15 App. Cas. 267.

render of the certificates, his executors signed blank forms of transfers on the back of the certificates and delivered the certificates to brokers for the purpose of getting the shares registered in the names of the executors. The brokers fraudulently pledged the certificates to a bank which took in good faith and without notice of the brokers' want of authority. It was held that the bank was not entitled to hold the certificates against the executors, because the conduct of the executors was consistent either with an intention to authorize the brokers to sell or pledge the shares or with an intention to authorize the brokers to get the shares registered in the name of the executors, and that the executors were not estopped from setting up their title against that of the bank (*j*). It was, however, said in *Colonial Bank v. Cady* that if the registered owner of the shares had himself endorsed the certificates in blank and delivered the certificates to the brokers, he could have had only one intelligible object in view, namely, that of transferring the title or enabling the brokers to transfer the title, and therefore he would be estopped from setting up his title against a transferee acting in good faith and without notice (*k*). The correctness of the use of the word "estopped" in the judgments in the foregoing case was questioned in *Fry v. Smellie* (*l*), on the ground that the supposed case of estoppel was rested, not solely upon the representation of the owner implied in the delivery to the brokers of the certificate endorsed with a transfer in blank, but also upon the relation of principal and agent existing between the owner and the brokers. *Fry v. Smellie* was itself a case of the delivery of share certificates in a transferable condition to an agent with some authority to pledge or sell, and the situation was therefore one in which the agent had power to make a valid sale or pledge to a third party taking in good faith and without notice of the limitations of the agent's authority (*m*); but the doctrine of estoppel stated

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(*j*) Cf. *Société Générale de Paris v. Walker* (1884), 11 App. Cas. 20, and *France v. Clark* (1884), 26 Ch. D. 257, in which the pledgee failed as against the owner.

(*k*) 15 App. Cas. 267 at pp. 280, 285, 286.

(*l*) [1912] 3 K.B. 282.

(*m*) A similar situation relating to title deeds existed in *Brocklesby v. Temperance Permanent Building Society*, [1895] A.C. 173, which was followed in *Fry v. Smellie*. See also *McLeod v. Brazilian Traction L. & P. Co.* (1927), 60 O.L.R. 253, [1927] 2 D.L.R. 875. As to a similar situation relating to a negotiable instrument, in special circumstances, see *Lloyds Bank v. Cooke*, [1907] 1 K.B. 794.

in *Colonial Bank v. Cady* has sometimes been applied in cases in which it does not appear that there was any authority whatever given to the brokers to sell or pledge, and nevertheless the pledgees were protected on the ground that the owners, by reason of their having left the certificates in the hands of the brokers in such a condition as to convey a representation that the brokers had authority to deal with them, were estopped from setting up their title against the pledgees who had acted on the faith of the representation (*n*).

In *Rumball v. Metropolitan Bank* (*o*) scrip certificates to bearer for shares in an English joint stock company were held to be negotiable; but in *London and County Banking Co. v. London and River Plate Bank* (*p*) certificates as to shares in the Pennsylvania Railroad Company, which stated that the shares were "transferable only in person or by attorney on the books of the said company," and which had on the back blank forms of transfer signed by the certified shareholders, were held not to be negotiable instruments, notwithstanding evidence that these certificates were treated as negotiable by delivery on the English market.

The share certificate which must be surrendered in order that the transfer of the shares may be registered is substantially in the same position as a registered bond (*q*). The transfer of the title to the certificate is governed by the *lex situs* of the certificate at the time of transfer, and under the proper law of the contract between him and the transferor (which would usually be the same as the *lex rei sitae*) he may, as to the shares, acquire some "property, right or interest," but the title to or ownership of the shares, strictly speaking, can be vested in him only in accordance with the *lex situs* of the shares (*r*). If the certificate is in fact in country X, and the share registry is in country Y,

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(*n*) *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K.B. 168. The case of *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 (a case relating to bonds) was followed, on the point that the pledgee was not put upon enquiry as to the ownership of the shares or the authority of the brokers.

(*o*) (1877), 2 Q.B.D. 194.

(*p*) (1877), 20 Q.B.D. 232; S.C. (as to certain bonds), 21 Q.B.D. 535. As to the distinction between the transfer of the title to the certificates and the transfer of the title to the shares, note (*g*) at the beginning of the present § 3, *supra*.

(*q*) See heading (*c*), *supra*.

(*r*) *Cf. Secretary of State of Canada v. Alien Property Custodian for the United States of America* [1931] S.C.R. 169, [1931] 1 D.L.R. 290; *The King v. Cutting*, [1932] S.C.R. 410, [1932] 3 D.L.R. 273.

the certificate is a document of value and of some operative effect, although not completely operative to transfer the title to the shares, and therefore it may be the subject of taxation in X (s), if the legislation of X is not subject to territorial limitations similar to those which are applicable to provincial legislation in Canada, and at the same time, the shares themselves may be the subject of taxation in Y. Again, the legislation of Y relating to companies falling within its scope may be so expressed as to reduce to a minimum the importance of the registration requirements of Y as against a transferee of the certificate who has bought the certificate in a recognized market (t).

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(s) Cf. *Stern v. The Queen*, [1896] 1 Q.B. 211; see also Dicey, *Conflict of Laws* (5th ed. 1932), notes to rule 76, for other examples of anomalous situations created by taxing legislation.

(t) Cf. the Dominion Companies Act, 1934, s. 36, superseding R.S.C. 1927, c. 27, s. 77. In the United States, see the Uniform Stock Transfer Act, drawn by the National Conference of Commissioners on Uniform State Laws, and enacted in many of the states of the United States.

## CHAPTER XXI.

### THINGS AND INTERESTS IN THINGS\*

- § 1. Movables and immovables: personalty and realty, p. 433.
- § 2. Classification of interests in land, p. 439.

#### § 1. Movables and Immovables: Personalty and Realty.

Tangible things are either movable (goods or personal chattels) or immovable (land). The terms immovable and movable indicate the relatively simple classification of tangible things according to their physical nature, corresponding with the natural distinction between land and other things; and we may say that immovables and movables are different kinds of tangible things, not different kinds of interests in things.

Persons may have interests in things. In other words the things may be the subject of interests (*a*). These interests are of course themselves intangible legal concepts which may be various in kind and variously classified in different systems of law. The classification of these interests is likely in any particular system of law to be based on considerations peculiar to that system, and may not correspond exactly or even approximately with the distinction between interests in immovables and interests in movables. For example, in English law (and Anglo-American law generally) interests in things are classified as real property (or realty) and personal property (or personalty), and these two classes of interests are far from being equivalent to interests in land and interests in movable things respectively. A freehold estate in land is classified as realty, whereas a leasehold estate or chattel interest in land is classified as personalty, but the thing which is the subject of the interest is in either case

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\*This chapter reproduces in a revised form §§ 1 and 2 of an article, entitled *Immovables in the Conflict of Laws*, published (1942), 20 Canadian Bar Review 1-11, subsequently forming part of a chapter bearing the same title, in my *Law of Mortgages* (3rd ed. 1942) 763-774.

(*a*) It is assumed at this point that there may be an interest in a thing in the sense of a proprietary right or the property in a thing (*jus in re*) as distinguished from an interest in the sense of a right relating to a thing (*jus ad rem*) or from a mere personal right. These dubious distinctions are material in chapter 30, and are discussed there.

land, that is, an immovable thing (*b*). A leasehold estate in land is mentioned here merely as an example of an interest in land which is classified in English law as personalty. Other examples will be mentioned later (*c*).

At the risk of repetition it may be observed that the distinction between immovables (land) and movables and that between realty and personalty are not only substantially divergent because personalty includes some important interests in immovables, but are also, so to speak, distinctions in different planes, one being a distinction between different kinds of things, the other being a distinction between different kinds of interests in things. The terms immovable and movable cannot be applied in any real sense to intangible interests in things as distinguished from tangible things, and it is doubtful whether these intangible interests can have a situs in any real sense (*d*). There is no need to assign a legal situs to an interest in a tangible thing as distinguished from the actual situs of the thing which is the subject of the interest. On the other hand, if the thing which is the subject of the interest is itself intangible, neither the so called thing nor the interest in it has any actual situs,

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(*b*) See *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461; *Duncan v. Lawson* (1889), 41 Ch. D. 394. The language of the judgments in both cases is confused by reason of the failure to distinguish between things and interests in things: see Cook's observations on *Duncan v. Lawson*, quoted in the present § 1, *infra*.

(*c*) See § 2, *infra*, as regards the interest of a mortgagee of land, the interest of a vendor of land under a contract of sale not yet completed by conveyance, and the interest of a beneficiary under a trust for conversion of land.

(*d*) I hasten to plead guilty to having in some of my earlier articles used the expressions "immovable property" and "movable property", inconsistently with the terminology advocated and adopted in the present chapter. Johnson, *Conflict of Laws with Special Reference to the Law of the Province of Quebec*, vol. 3 (1937) 217, 301, uses the same expressions in his discussion of movables and immovables, but in his case this is explained by the fact that the expressions occur in the English version of the Civil Code of Lower Canada, notably in article 6 (stating conflict rules with regard to immovable and movable property) and article 374 (stating that property is movable or immovable). The French version, more accurately, speaks of *biens immeubles* and *biens meubles*. A comparison of the French and English versions of other articles shows similarly that there is no confusion in the French version between things (*biens, choses*) and the property (*la propriété*, article 406) which persons may have in things, whereas in the English version "property" occurs frequently in the sense of "things", an extreme example occurring in article 583, where the words *la propriété des biens*, of which an exact translation would be "the property in things", and which might also be translated as "the ownership of things", appear in the English version in the confusing expression "ownership of property".

and if it should seem to be useful to assign a situs to either of them, that situs must be an artificial one, invented, by analogy or otherwise, for the purpose of bringing intangibles within the scope of certain rules of law expressed in terms of situs. Furthermore, even the use of the word thing as descriptive of the intangible concept involves a reification of what has no real existence (e).

Intangible things, having no actual situs, cannot properly be described as being either movable or immovable, so that things should be classified as being (1) tangible things, which may be either (a) movable or (b) immovable, and (2) intangible things. For some purposes, however, it is common practice to classify all things as being movable or immovable and to include intangibles in movables (f), sometimes merely tacitly or impliedly, often without any apparent consciousness of the incongruity of the classification (g).

We now have to see what bearing the foregoing observations have upon problems of the conflict of laws. Conflict rules (h) are designed to indicate the principles which should govern the selection by the forum of the proper law applicable to a particular question arising for decision. The selection must be made between the domestic law of the forum and some other system or systems of law, one of which may be merely technically foreign in the sense that it is the law of a country other than that of the forum, though based on concepts and classifications substantially the same as those prevailing in the *lex fori* (i), while another may be foreign also in the sense that its legal concepts and classifications are substantially different from those of the *lex fori* (j).

If regard is had to the purpose to be served by conflict rules, it is obvious that those rules should be based on distinc-

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(e) Cf. chapter 20.

(f) Cf. chapter 32.

(g) Some of the mysteries of current language with regard to intangibles are explored by Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 284 ff.

(h) As to "conflict rules" and "domestic rules" of the law of the forum, see chapter 1; as to the meaning of a conflict rule, see chapter 2.

(i) For example (from the point of view of Ontario), the law of another common law province of Canada, the law of a state of the United States (other than Louisiana) or the law of England.

(j) For example (from the point of view of Ontario), the law of Quebec, Scotland, France, Italy or Germany.

tions and classifications which are, so far as practicable, universal and natural, and therefore susceptible of application to the different systems of law between which a choice must be made, (as, for example, the distinction between immovable things (land) and movable things), and not upon distinctions and classifications which are technical and complex in that they involve legal concepts which may be peculiar to a particular system of law, and are therefore unsuitable as a basis of selection between different systems of law, (as, for example, the distinction between different kinds of interests in land and other things). It is important therefore that things and interests in things be not confused (*k*).

In fact, as will appear later, the selection of the proper law in the conflict of laws in matters relating to land is based upon the distinction between immovables and movables and not, as a general rule, or, except as required by statute, upon the distinction between realty and personalty (*l*). This is so notwithstanding that sometimes judges (especially in the older cases), and sometimes even non-judicial authors, have confused the terminology of the conflict of laws by stating conflict rules in terms of realty and personalty, instead of immovables and movables, thus involving themselves in illogical exceptions which cease to be exceptions when the general rules are accurately stated (*m*).

Of especial interest in this connection is the decision of the House of Lords, on appeal from the Second Division of the

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(*k*) See especially Cook, 'Immovables' and the 'Law' of the 'Situs' (1939), 52 Harv. L. Rev. 1246, (reprinted as chapter 10 in *The Logical and Legal Bases of the Conflict of Laws* (1942)), a valuable contribution in aid of the adoption of accurate terminology in the conflict of laws. It is submitted that the use of the terms "immovable" and "movable" with reference to things as distinguished from interests in things is of practical importance, notwithstanding the doubt sought to be cast on its utility by Robertson, *Characterization in the Conflict of Laws* (1940) 192, note 134. The distinction is not observed in the otherwise good discussion of movables and immovables in Cheshire, *Private International Law* (2nd ed. 1938) 409 ff. Robertson, *op. cit.*, 190 ff., deliberately refuses to abandon language which confuses things and legal interests in things, and in the note above mentioned exaggerates the saving in words achieved by adherence to that language. Cook, in his supplementary remarks, 1942, appended to chapter 10 of his book above cited, pp. 281-283, quotes Robertson's note and specifically replies to it. See also Cook's chapter 11, at pp. 284, 285.

(*l*) The general principle and the exception will require more detailed statement and discussion in connection with succession, in chapter 22, § 2.

(*m*) See, *e.g.*, chapter 24.

Court of Session, Scotland, in the case of *Macdonald v. Macdonald* (n). The pursuer was a daughter of the *de cujus*, and the defender was the widow, executrix-nominate and universal legatee of the *de cujus*. The pursuer claimed *legitim*, (that is, "a right of succession to a share of the father's moveable estate, vesting in the children *ipso jure* on their father's death, but expiring with a predecease of the children, and not transmissible in that event to their heirs"); and contended that certain lands owned by her father and situated in British Columbia, Manitoba and Saskatchewan ought to be brought into account for the purpose of estimating the fund from which *legitim* would be payable. It was held by the House of Lords that even though real property in those provinces devolved upon the personal representative of a deceased person and must be administered in the same manner as personal property, the interest claimed was an interest in immovables by the law of those provinces (the *lex rei sitae*) and therefore must be treated as such for the purpose of succession in Scotland: consequently, as no right to *legitim* was conferred by the *lex rei sitae*, the pursuer's claim to bring into account the lands in those provinces failed. Lord Tomlin said (o):

From the nature of the case *legitim*, which may be regarded as part of or at any rate as affecting the Scots law of succession, cannot for that reason, in my view, be extended to touch foreign assets other than those which devolve according to the *lex domicilii*. The English law classifies property as real property or personal property. The terms moveable and immoveable are not technical terms in English law when it is not regarding the law of a foreign country. The Scots law distinguishes between property which is heritable and property which is moveable, and, except to this extent, does not any more than the English law recognise for internal purposes the antithesis between moveable and immoveable. But each system, when brought into contact with a foreign system, does, in accordance with the principles of what is called private international law, recognise the antithesis for the purpose of applying the rule of comity that, in matters of succession, moveables devolve according to the law of the domicile of the deceased and immoveables devolve according to the *lex rei sitae*.

In the original article upon which this chapter is based I did not intend to suggest that there was any inherent reason why the forum in a particular country *could* not, or *might* not, base its conflict rules upon the distinction between real property and personal property instead of the distinction between interests in immovables and interests in movables. That

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(n) 1932 S.C. (H.L.) 79, 1932 Scots L.T.R. 381.

(o) 1932 S.C. (H.L.) 79, at p. 84.

is a matter of the policy of the forum (*p*). My mention of the possibility of statutory exceptions indicates that I am discussing only a general rule. I submit that it is desirable that conflict rules relating to things should be based on the distinction between immovables and movables, and that in Anglo-American law it is usually only by inadvertence or misunderstanding that they are occasionally expressed in terms of real property and personal property; but there is of course nothing to prevent a particular country from deliberately expressing its conflict rules in such terms. The best known statutory example of a conflict rule expressed in terms of personal property was undoubtedly so expressed by inadvertence or misunderstanding (*q*).

I venture also to point out, merely by way of additional precaution against misunderstanding, that once the law of a particular country has been selected as the proper law on the basis of the distinction between immovables and movables, then, if the domestic rules of that law are to be applied and those rules are based on the distinction between real property and personal property, they will be applied without regard to the distinction between immovables and movables. The latter distinction is material for the purpose of the conflict rules of the forum, but is immaterial for the purposes of the domestic rules of the proper law if, as in the case supposed, that distinction is not a feature of those rules (*r*).

A source of confusion already mentioned is the failure to distinguish between things and interests in things. Cook gives the following example (*s*):

In *Duncan v. Lawson* (*t*) a domiciled Scotchman "possessed leasehold estates in England" (*u*). By his will he gave all his "real and

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(*p*) Cf. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 291, note 20, attributing to me a somewhat more rigid theory than I intended to express.

(*q*) See Lord Kingsdown's Act, in chapter 23.

(*r*) The point is illustrated, in connection with succession, in chapter 22, § 2, and in chapters 24, 26 and 29.

(*s*) 'Immovables' and the 'Law' of the 'Situs' (1939), 52 Harv. L. Rev. 1246, at pp. 1253, 1254, reprinted in *The Logical and Legal Bases of the Conflict of Laws* (1942) 252, at pp. 259, 260.

(*t*) (1889), 41 Ch. D. 394.

(*u*) Note the confusion of factual and legal elements in this phrase, which is quoted from the opinion in the case. "Leasehold estate" is the legal interest; this is not "situated in" England, nor is it, in any proper sense, "possessed", i.e., not as a physical object is "possessed".

personal property to trustees, with power to convert, and directed them to pay certain pecuniary legacies to charities in England and Scotland." It was admitted that these gifts to charities were void: the question was, who took the leasehold interests, i.e., did English or Scotch 'law' apply? On one side it was argued that leasehold interests were 'personal property' and that as to 'personalty', the rule '*mobilia sequuntur personam*' applied. To this the court answered that the 'leaseholds' were 'immobilia' even though they devolve upon the executor, and so the *lex loci rei sitae* (English law) applied. If we translate this into the terminology here suggested, we have: A leasehold interest in English land is, no matter to whom it may pass on the death of one who has it, an interest in (an aggregate of legal relations relating to) an 'immovable' physical object physically situated in England. In view, therefore, of the plain fact that only English officials can lawfully deal with that physical object, the same considerations of policy that lead us to apply English 'law' to the devolution of other interests are applicable here, and so the 'law' of the 'situs' (the physical location of the land) applies. Why confuse ourselves and our readers by adding "therefore the leasehold interest [an 'intangible'] is an immovable"? At best, the statement is merely the result reached by an unnecessary fifth wheel to our coach. It adds nothing to our knowledge of the reasons for the decision. Furthermore it tends to mislead us as to what those reasons are (v).

Any attempt to state conflict rules in terms of realty as being approximately equivalent to immovables and of personalty as being approximately equivalent to movables can lead only to ambiguity and confusion. A good example is the unfortunate attempt made in the Special Note on p. 298 of the Conflict of Laws Restatement of the American Law Institute to justify the indiscriminate use of real property in the sense of immovables and personal property in the sense of movables (w).

## § 2. Classification of Interests in Land.

For the purpose of the next following discussion it may be assumed that as a general rule (a) questions of the creation,

(v) A further footnote of Cook's is omitted.

(w) Although Topics 2 and 3 in chapter 7 (Property) of the Restatement are entitled Immovables and Movables respectively, the distinction between immovables and movables does not appear to be stated in the text (that is, the black letter text) of any section but is mentioned merely in comments, and in Topic A of the same chapter §§ 208, 209 and 210 relate only to the distinction between realty and personalty: cf. criticism of these sections (formerly §§ 227A, 228A and 229A of the Proposed Final Draft) in my Contract and Conveyance in the Conflict of Laws (1933), 81 U. of Penn. L. Rev. 661, at pp. 663 ff.

(a) This general rule is discussed in chapter 22, § 2, and chapter 30; and some reference is made in chapter 22, in the concluding subdivision of § 2, to the doctrine of the *renvoi*, and the question what is meant by a reference in a conflict rule to the *lex rei sitae* or the law of the situs of the thing.

acquisition, transfer and extinction of interests in immovable things are governed by the *lex rei sitae*, that is, the law of the country where the thing which is the subject of the alleged interest (or in which the interest is claimed) is situated (*b*). In this connection there may arise subsidiary or necessarily incidental questions, namely, (1) whether the alleged interest is an interest in a thing as distinguished from a right relating to a thing or a mere personal right which may be governed by some law other than the *lex rei sitae*, and (2) whether the interest, if any, is an interest in an immovable or an interest in a movable, that is, whether the thing which is the subject of the interest is immovable or movable, or whether the interest should be treated in the conflict of laws as if it were an interest in an immovable or an interest in a movable, as the case may be. If the alleged interest is acquired by way of succession on death, the question whether the interest is an interest in a movable or an interest in an immovable is crucial, because succession to movables is governed by the *lex domicilii* of the *de cuius* (*c*), whereas succession to immovables is governed by the *lex rei sitae* (*d*). On the other hand, if the alleged interest arises from a transaction *inter vivos*, the question whether the interest is an interest in a movable or an interest in an immovable may or may not be important, because the rule that the transfer of an interest in a thing by particular assignment *inter vivos* is governed by the *lex rei sitae* applies not only to immovables (*e*), but also at least to tangible movables (*f*) and to some extent by analogy, to intangible things or interests in them (*g*).

As a general rule any question arising from a factual situation must be characterized (*h*), that is, its juridical nature must be determined, in accordance with the *lex fori* as a preliminary to the selection of the proper law, because *ex hypothesi* no foreign law has yet been selected as the proper law. There is no reason, however, why the forum should not, before finally characterizing the question, consider the provisions of any foreign law which may be the proper law on some characterization of

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(b) As to what is meant by an "interest" in a thing or the "property" in a thing, see chapter 30.

(c) See chapter 32.

(d) See chapter 22.

(e) See chapter 30.

(f) See chapter 19.

(g) See chapter 20.

(h) See chapters 3, 4 and 5.

the question, so that the characterization of the question by the forum may not be a leap in the dark, but a reasoned conclusion reached in the light of the definitive solution which will result from the selection of a particular law as the proper law (*i*). In a case in which it is claimed that an interest in land has been acquired, and the land is situated abroad, it is obvious that if the court does not decline jurisdiction to adjudicate on the case (*j*) it must consult the *lex rei sitae*. That law being the governing law with regard to the acquisition of an interest in land must also be decisive on the necessarily incidental question whether the interest in controversy is an interest in land or some other kind of interest or right (*k*). The *lex rei sitae* means in this connection whatever a court of the situs of the land would decide in the particular case. If, as is often the case, the land is situated in the country of the forum, so that the *lex fori* is also the *lex rei sitae*, the domestic rules of the latter law are usually, but not necessarily, applicable by virtue of the conflict rules of the former law (*l*).

Dicey (*m*) states in his rule 149:

The law of a country where a thing is situate (*lex situs*) determines whether

- (1) the thing itself, or
- (2) any right, obligation or document connected with the thing, is to be considered an immovable or a movable.

It will be observed that clause (1) is consistent, while clause (2) is inconsistent, with the modes of expression advocated and adopted in the present chapter, and it is submitted that it would be better to say that the law of the situs of a thing determines whether

- (1) the thing itself is movable or immovable, or
- (2) any right, obligation or document connected with the thing is an interest in the thing, or should be treated in the conflict of laws as an interest in the thing or so closely connected with the thing that it should be governed by the same law as that which governs interests in the thing.

The point of chief interest in the rule is clause (2). It has been held, for example, that a Scottish heritable bond (that is, a bond for a sum of money, to which is joined, for the creditor's further security, a conveyance of land or of heritage), in so far

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(*i*) See chapter 6 and chapter 8, § 7.

(*j*) On this point, see chapter 30, § 3.

(*k*) See chapter 4, § 7.

(*l*) See chapter 22, § 2(8).

(*m*) Conflict of Laws (5th ed. 1932).

as it is regarded by the *lex rei sitae*, the law of Scotland, as immovable, must be so regarded by an English court (*n*). As Dicey (*o*) points out, a heritable bond may itself be deposited in a bank in England, but he says that it is a Scottish law—the *lex situs* of the land on which the bond imposes a charge—that determines the character of the bond. A preferable mode of statement would be, not that the bond is to be regarded as an immovable because the *lex rei sitae* so regards it, but that the bond, though in fact a movable, is so closely connected with the land that it should be governed by the law appropriate to interests in the land rather than the law applicable to the bond in its character of a movable.

It is submitted that a similar approach to the subject of fixtures, or chattels annexed to land or, though not physically annexed, at least connected with the land, would be helpful. That is to say, regard should be had, not so much to the characterization of things annexed to land or connected with land as movables or immovables in themselves, as to the question whether social convenience or practical expediency requires that they should be treated as falling within the rules of law applicable to the land (*p*).

Chattels may, by reason of their physical annexation or attachment to land, or their incorporation in buildings on the land, become part of the land in a real sense and lose their character of movables. Even then, if they are susceptible of being severed from the land, they may, on severance, resume their character of movables, and, if they are taken to another country, may be dealt with under the law of their new situs, without regard to the fact that under the law of their former situs they may be still regarded as so closely connected with the land that they should be subject to the law of the former situs. If the chattels, instead of being physically attached to the land are merely "constructively annexed", as in the case of "the keys of a house, the stones of a dry wall and the detached or duplicate portions of machines" (*q*), it is obvious that they

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(*n*) *In re Fitzgerald, Surmon v. Fitzgerald*, [1904] 1 Ch. 573, at p. 588, and the cases there cited; but see the discussion of the earlier cases in Foote, *Private International Law* (5th ed. 1925) 246-250.

(*o*) *Conflict of Laws* (5th ed. 1932) 580-581.

(*p*) *Cf.* Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 307-309.

(*q*) 10 *Encyclopaedia Britannica* (11th ed. 1910-1911) 451, *sub tit.* Fixtures.

are movables, notwithstanding that by the law of the country in which the land is situated they may be considered to be so closely connected with the land that the law of the situs of the land should govern the title to them or dealings with them. If their situs is changed, they will of course come under the dominion of the law of the new situs.

Subject to the foregoing observations the following well-known passage may be quoted from Story (r):

Fourthly, in relation to the subject-matter, or what are to be deemed immovables. Here, as we have already seen, not only lands and houses, but servitudes and easements, and other charges on lands, as mortgages and rents, and trust estates, are deemed to be, in the sense of law, immovables, and governed by the *lex rei sitae*. But in addition to these, which may be deemed universally to partake of the nature of immovables, or (as the common-law phrase is) to savour of the realty, all other things, though movable in their nature, which by the local law are deemed immovables, are in like manner governed by the local law. For every nation having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character which it shall choose; and no other nation can impugn or vary that character. So that the question, in all these cases, is not so much what are or ought to be deemed, *ex sua natura*, movables or not, as to what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature or character (s).

In accordance with Story's opinion it has been held in England that a mortgage on land in England creates an interest in land, and that a mortgage on land in Ontario creates an interest in land because it does so by the law of Ontario, and consequently that as the law of Ontario (the *lex rei sitae*) does not permit a gift of land to a charitable use, a gift of a mortgage on land in Ontario to a charitable use made by the will of a domiciled Englishman is void in England. The fact that a mortgage is regarded as personal property in domestic English or Ontario law (t) has no bearing on the question whether it creates an interest in land or in a movable in matters of the conflict of laws. A mortgage undoubtedly affects the land directly. If the mortgage is a legal mortgage, the mortgagee is in

(r) Conflict of Laws (8th ed. 1883) § 447, p. 629; cf. § § 424 and 463.

(s) On this point, see *Dominion Bridge Co. v. British American Nickel Corporation* (1924), 56 O.L.R. 288, [1925] 2 D.L.R. 138.

(t) On the point that a mortgage security (including the interest of a mortgagee in the mortgaged land) is personal property, see chapters 24 and 25.

law the owner of the land. The mortgagee must reconvey on payment, and therefore he cannot assign the mortgage debt effectually without also transferring the security. He may take possession on default, and he may by foreclosure obtain an absolute title, etc. (u).

Westlake (v), using as illustrations the same cases of the Scottish heritable bond and the mortgage on land in Ontario, states (§ 160) that "When security is given on immovables for a debt which is also personally due, the *lex situs* of the immovables decides whether the debt is to be considered [an interest in] an immovable, that is, as an alienation of so much of the value of the immovables on which it is secured, or as a mere debt with collateral security." He adds, however, (§ 161) that "if a separate security be taken in another country for the same debt, [§ 160] will not apply, because the *lex situs* of the immovable security (w) will be unable to affect the entire character of the debt."

As a general rule (x) the selection of the proper law with regard to interests in land is independent of the distinction between real property and personal property. As has been already pointed out, the fact that a leasehold estate in land or a mortgagee's interest in the mortgaged land is classified in English law as personalty is consistent with its being an interest in land and, in that character, falling within the rule as to the application of the *lex rei sitae* stated above (y). Apart from the doctrine of conversion the interest of a beneficiary under a trust of either a freehold estate or a leasehold estate is an interest in land, although his interest is in the one case personalty and in the other case realty. If there is a trust or agreement for conversion of realty into personalty or of personalty into realty, then, at least for some purposes, the property is in equity regarded as already converted, and already impressed

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(u) *In re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179, C.A. affirming [1910] 2 Ch. 333. See also chapter 26.

(v) *Private International Law* (7th ed. 1925) 217-218; cf. Foote, *Private International Law* (5th ed. 1925) 246 ff.

(w) I have inserted "an interest in" in the text of § 160, and I suggest that the language of § 161 would be more accurate if the word "security" were omitted.

(x) As to this "general rule", see especially notes (p), (q) and (r) in § 1, *supra*. An exception to the rule is created by Lord Kingsdown's Act (see chapter 22, § 2, and chapter 23) which relates to the formalities of making of a will of "personal estate."

(y) At the beginning of the present § 2.

with the character of personalty or realty, as the case may be, into which it is bound ultimately to be converted (z). Until the subject of the trust is actually converted, however, the interest of the beneficiary continues, in accordance with fact, to be an interest in the unconverted subject of the trust. In other words, the interest of the beneficiary is to be characterized in accordance with the actual condition of the subject at the material time. Thus, if the subject of the trust is in fact land, the beneficiary has an interest in land governed in the conflict of laws by the *lex rei sitae*, notwithstanding that in the case of a leasehold estate it is already in domestic English law personalty, and in the case of a freehold estate under a trust for conversion, it is already regarded for some purposes of domestic law as personalty (a); but when the *lex rei sitae* has been selected as the proper law because the beneficiary has an interest in land, and that law is one which classifies the beneficiary's interest as personalty, it will devolve or be disposed of in accordance with the domestic *lex rei sitae* relating to personalty (b). Conversely, if the subject of the trust is money or movable securities, and there is a direction for the conversion of the subject into land, the beneficiary has an interest in movables if they are still unconverted at the material time. If at the material time the subject of the trust has been actually converted, the beneficiary has an interest in land or in movables, as the case may be, according to the actual condition of the subject, and the selection of the proper law in the conflict of laws will be made on this basis (c). If under a trust to raise a sum of money, the trustees may raise it without selling or mortgaging land, the beneficiary has, not an interest in land, but merely a right which must be treated as possessing the character of an interest in movables (d). In the case of a contract of sale of real property, the vendor's interest is personalty which as such devolves on his personal representative, but his interest is nevertheless an interest in land, governed in the conflict of laws by the *lex rei sitae* (e).

(z) Cf. Bowen L.J. in *Attorney-General v. Hubbuck* (1884), 13 Q.B.D. 275, at p. 289.

(a) *In re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192. This case was distinguished in *In re Cutcliffe's Will Trusts*, commented on in chapter 29.

(b) The same principle is applicable to a leasehold estate in land or a mortgagee's interest in the mortgaged land, above mentioned.

(c) *In re Piercy, Whitwham v. Piercy*, [1895] 1 Ch. 83.

(d) *In re Anziani, Herbert v. Christopherson*, [1930] 1 Ch. 407.

(e) *Re Burke* (1927), 22 Sask. L.R. 142, [1928] 1 D.L.R. 318, [1927] 3 W.W.R. 817.

## CHAPTER XXII.

### ADMINISTRATION AND SUCCESSION\*

§ 1. Administration of estates, p. 446.

§ 2. Succession on death

- (1) The *lex rei sitae*, p. 452.
- (2) Intrinsic validity of will, p. 454.
- (3) Formal validity of will, p. 456.
- (4) Various questions of succession, p. 458.
- (5) Revocation of will, p. 461.
- (6) Change of domicile; construction of will; election, p. 463.
- (7) Escheat and *bona vacantia*, p. 466.
- (8) The law of the situs and the *renvoi*, p. 466.

#### § 1. Administration of Estates

Some aspects of the distinction drawn in Anglo-American law between administration of the estate of a deceased person and succession to his estate on his death (*a*) are stated in the following passages quoted from the beginning of chapter 5 (entitled Succession to Movables on Death) of Westlake, *Private International Law* (*b*):

In England and in those countries and colonies of which the law is derived from that of England, the personal (*c*) property of a deceased person can only be possessed under a grant from public authority, usually judicial. Such grant is, in England, in one of three forms: (1) Probate of a will, granted to the persons, one or more, appointed in such will as executors; (2) Administration with the

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\*This chapter reproduces in a revised form §§ 3 and 4 of an article, entitled *Immovables in the Conflict of Laws*, published (1942), 20 *Canadian Bar Review* 11-27, 109-113, subsequently forming part of a chapter, bearing the same title, in my *Law of Mortgages* (3rd ed. 1942) 774-796.

(*a*) As to the distinction between administration and succession, see also chapter 4, § 6, and chapters 32 and 33; cf. Robertson, *Characterization in the Conflict of Laws* (1940) 168 ff.

(*b*) The footnotes are mine.

(*c*) Westlake says "personal or movable", but the word "movable" is inappropriate in the present context. As already pointed out in chapter 21, § 1, personal property includes some interests in immovables, and to say "personal or movable" is merely confusing.

will annexed, where no executor is appointed by the will; (3) Administration, where the deceased left no will.

The executors or administrators have to realize the personal property of the deceased, pay his debts, and distribute the surplus among those who may be entitled under the will, or by law in case of intestacy. These duties are classed together under the name of administration, which term has therefore two meanings: it is used in opposition to probate, to express a certain description of public grant, and it is used to express that course of dealing with the property granted which is expected from the grantee, whatever was the kind of grant (*d*).

In cases where the deceased person died after the Land Transfer Act, 1897, came into operation, on 1st January, 1898, the real (*e*) property also vests in the executor or administrator in the same way as personal property (*f*).

In those countries of which the law has been derived from that of Rome more directly than has been the case with the English law on the subject, the movable property of a deceased person, like his immovable property, descends on the heirs appointed by his will or entitled by law as the case may be, and in some cases on his universal legatees, subject of course to the acceptance of such heirs or legatees. And these are personally liable for the debts of the deceased, though, if they have accepted the succession with benefit of inventory, only to the amount of the property received by them, to which amount they are also liable for the particular legacies bequeathed by the will; but the beneficial interest is theirs (*g*), subject to the satisfaction of the debts and particular legacies. The appointment of executors by a testator is exceptional, and the power of making it, is usually limited, as for instance by article 1026 of the Code Napoléon, which permits

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(*d*) In the present § 1 we are concerned primarily with administration in the second of these senses: *cf. Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, at p. 504, Earl of Selborne (who also mentions administration in a third sense, namely, administration by the court under a decree for administration). The granting of probate or refusal to grant probate may of course involve questions of formal or intrinsic validity of a will, which are either themselves questions of succession rather than administration or may be more conveniently discussed under the heading of succession.

(*e*) Westlake says "real or immovable", but in the present context "real" is appropriate, and it is merely confusing to add "or immovable", because some interests in immovables are personal property, and devolve upon the executor or administrator apart from the statute.

(*f*) In Ontario a similar change in the law was made by the Devolution of Estates Act of 1886. In most of the other provinces of Canada, except Quebec, a similar change has been made by statute.

(*g*) One result of the fact that the foreign heir or legatee is the successor of the deceased person and not merely a representative for the purpose of administration is that he may bring an action in England without obtaining a grant there: *Vanquelin v. Bouard* (1863), 15 C.B.N.S. 341. In that case, alternatively, the plaintiff (the widow) was held entitled to sue in England in her individual character on the grounds that after her husband's death she had personally paid what her husband had been liable to pay and was subrogated to his right against the defendant, and that she had also obtained a judgment in her own country against the defendant.

seisin of movable property alone to be given to the executors, and of this for not more than a year and a day (*h*).

In the former or English system only the beneficial interest in the surplus of personal property (and since 1898 (*i*) in the real property also), remaining after payment of debts is transmitted on death, whether in the case of testacy or intestacy. The personal property itself passes by the public grant, made after the death and implying no beneficial interest, though in the absence of an executor appointed by will it is usually made to some one beneficially interested. In the latter or continental system, the movable property is itself transmitted on death, whether in the case of testacy or intestacy, and such transmission implies a beneficial interest, which is limited only by the debts and legacies to be satisfied out of it. This system, as will be perceived, is very similar to that which through successive legislative changes came to exist in England for real property before the Land Transfer Act, 1897 (*j*). The common origin of both systems is the ancient principle of Roman law, by which the heir continued, and in that sense represented, the person of the deceased, both as to his rights and to his obligations. The principle has been modified in England, for personal property, first by making a public grant necessary in all cases for the representation of a deceased person, and secondly by separating the beneficial interest in the representation from the representation itself; and the executor or administrator, called in England the personal representative, has thus come to be something very different from the complete continuator of the deceased person. In the continental system the principle has been modified only by the benefit of inventory, introduced by Justinian.

The distinction between administration and succession has thus been, for a long period, a characteristic feature of Anglo-American law with regard to personal property, that is, with regard to all interests in movables and with regard to such interests in land (immovables) as are classified as personal property (*k*), and, by virtue of comparatively modern legislation, applies also to such interests in land (immovables) as are classified as real property as contrasted with personal property. It more frequently happens that the distinction between movables and immovables is important in succession than in administration, because, once the net surplus available for distribution among the successors is ascertained, the law of succession in the narrow sense becomes applicable, and then, in accordance with the conflict rules of the *lex fori* (which happens also to be the *lex rei sitae*), the forum resorts, as a general rule, to the *lex domicilii* of the *de cuius* as regards movables and the *lex rei sitae* as regards immovables, for the purpose of deciding who are the

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(*h*) As to the law of Quebec, contrasted with the law of the other provinces, with regard to administration and succession, see Johnson, *Conflict of Laws*, vol. 2 (1934) 510 ff.

(*i*) Since 1886 in Ontario.

(*j*) In Ontario, before the Devolution of Estates Act of 1886.

(*k*) See chapter 21, § 1.

persons, or classes of persons, entitled as successors or beneficiaries. Before the net surplus is ascertained, however, the course of administration, both as to movables and immovables, may be governed to a larger extent by the domestic rules of the law of the forum (*situs*). As always the forum must apply the conflict rules of the *lex fori*. Those conflict rules will usually indicate the domestic rules of the *lex fori* as the law governing the getting in of the assets and the payment of creditors' claims, but in various circumstances the domestic rules of some other law may be indicated. If, for example, the administrator sues or is sued on a contract made by the *de cujus* in his lifetime the proper law of the contract may be the domestic rules of the law of the forum or of the law of some other country (*l*) without regard to the law which will govern the distribution of the surplus when that surplus is ascertained. Again, in *Landreau v. Lachapelle* (*m*) the executor of the wife's estate claimed that by virtue of a transaction which took place in the wife's lifetime he was entitled on behalf of her estate and against her husband, to an interest in land situated in Ontario. If he succeeded, the assets of the estate would be increased and the proceeds would be distributed in accordance with the succession law of Ontario, the *lex rei sitae*. The question raised by the action was not, however, one of succession, but a question of the capacity of a married woman in a transaction *inter vivos*, specifically, the question whether her capacity was in the particular circumstances governed by the law of her domicile or the law of the *situs* of the land. In other words, there may be various questions arising in the course of administration which may be governed by various laws other than the domestic law of the forum or the proper law of succession itself.

As regards the payment of creditors' claims Westlake (*n*) says:

§ 110. Every administrator (*o*), principal or ancillary, must apply the assets reduced into possession under his grant in paying the debts of the deceased, whether contracted in the jurisdiction from which

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(*l*) As to the proper law of a contract, see chapter 14, § 5(a), and chapter 16, § 3.

(*m*) [1937] O.R. 444, [1937] 2 D.L.R. 504, discussed in chapter 31, § 3.

(*n*) Private International Law.

(*o*) Westlake uses the word "administrator" here as including an executor.

the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority which according to the nature of the debts or of the assets is prescribed by the law of the jurisdiction from which the grant issued.

This rule is an immediate consequence of the maxim of private international law that the priorities of creditors in a *concursum* are determined by the *lex fori* or *lex concursus*, which indeed is almost an inevitable maxim, for if two debts were contracted under different laws, and each by the law under which it was contracted would be prior to the other, how shall their order of priority be determined if not by the law of the forum where they meet? Mediatly, the rule is a consequence of the authority which English law attributes to the *situs* over the assets themselves, as distinct from the beneficial interest in the clear surplus of them; for it is by reason of that authority that English law first required the assets to be possessed under a grant in the *situs*, and then establishes a *concursum* in order to clear from debt the assets so possessed before the law of the deceased's domicile can affect their beneficial surplus. If the authority of the domicile or political nationality were admitted to extend over the gross instead of the net property left by the deceased, which is the general continental view, the succession would be opened, as the phrase is, in the country of the domicile or political nationality, the *concursum* of creditors would be there, and the law of that country would determine their order of priority, as on the continent it is generally held to do. In fact, in that system, it is not a *concursum* against the assets but against the heir, although his liability may be limited by the benefit of inventory; and the heir is determined for all jurisdictions by the law of the deceased's personal jurisdiction, in which the succession is opened.

Westlake's § 110 was quoted with approval in *In re Kloebe* (p) by Pearson J., who added:

No doubt, in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the court would be astute to equalize the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. But subject to that, which is for the purpose of doing that which is equal and just to all the creditors, I know of no law under which the English creditors are to be preferred to foreigners.

A court of the country of local administration may order the local personal representative to pay or transfer the clear surplus to the foreign domiciliary representative for distribution by him among the beneficiaries (ascertained by the proper law of succession). The making of an order of this kind is, however, a matter of discretion (q).

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(p) (1884), 28 Ch. D. 175, followed in Ontario in *Milne v. Moore* (1894), 24 O.R. 456.

(q) *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, at pp. 502, 503, 514; *Shaver v. Gray* (1871), 18 Gr. 419; *Young v. Cushion* (1909), 19 O.L.R. 491; *Re Donnelly* (1911), 2 O.W.N. 1388, explained in *Re Scratcherd* (1918), 15 O.W.N. 222; *Re Law* (1915), 34 O.L.R. 222, 24 D.L.R. 871; *In re Achilopoulos*, [1928] Ch. 433. In the case of *In re Lorillard, Griffiths v. Catforth*, [1922] 2 Ch. 638, 13 Brit. R.C.

Even with regard to assets situated within the territory of the forum of administration the payment of creditors' claims may be complicated not merely by questions of priorities of creditors *inter se* and their respective rights of recourse against particular assets, but also by questions of the rights of successors *inter se*, as, for example, the right of one successor to reimbursement from another successor in the event of the due course of administration being disturbed by the fact that a creditor has received payment out of particular assets which by the *lex fori* are not the primary fund, as between successors, for the payment of his claim. Questions of this kind become more difficult when assets are situated in different countries in which different rules of administration and succession prevail, especially when those assets consist of interests in both movables and immovables.

The country of administration being supposed, for the sake of example, to be England or Ontario, the former right of the heir or devisee of mortgaged land to have the mortgage debt paid out of the general personal property of the deceased mortgagor in exoneration of the mortgaged land, or the right of the heir or devisee to be reimbursed out of such personal property in respect of money paid by him to the mortgagee, would, as regards mortgaged land situated within the territory of the forum, be negatived, as a general rule, by Locke King's Act (*r*). As regards land situated outside the country of the forum of administration, it would appear that the heir, or the devisee when no intention on the point is expressed in the will, would not have any right of recourse against personal property in the country of the forum or any right to reimbursement there in respect of debts of the deceased paid by him, except so far as he has such right by the law of the situs of the land (*s*).

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560, the Court of Appeal in England came perilously close to defeating the proper law of succession when it refused to order payment of the surplus ascertained by English law to the domiciliary administrator, there being unpaid creditors' claims which were barred by the English statute of limitations but not barred by the corresponding statute of the country of the domicile of the *de cuius*: *cf.* chapter 35.

(*r*) Passed originally in the United Kingdom in 1854, and amended in 1867 and 1877; *cf.* the Administration of Estates Act, 1925, s. 35. In Ontario the corresponding statute is the Wills Act, R.S.O. 1937, c. 164, s. 37, dating in part from 1865.

(*s*) Westlake, *Private International Law*, § 118; *cf.* Dicey, *Conflict of Laws* (5th ed. 1932), appendix, note 25; *Conflict of Laws Restatement* (American Law Institute), § 490.

Similarly, no rule of law as to the mode of satisfying debts and legacies which may prevail in the country where the estate of a deceased person is being administered, even though he was domiciled there, can throw on the immovables a heavier burden in respect of debts or legacies than is thrown on them by the *lex rei sitae* (t). Therefore, even though a legatee might be entitled, by the doctrine of marshalling, to claim against the heir to land situated in England in respect of debts paid out of the personal property, marshalling will not be applied in his favour as against persons entitled to land situated in another country by the law of which the right to marshalling does not exist.

Some questions as to the power of the personal representative of a deceased person will be discussed in a later chapter (u).

## § 2. Succession on Death

### (1) *The Lex Rei Sitae*

The important general conflict rule (a) that the creation, acquisition, transfer and extinction of interests in a thing are governed by the law of the situs of the thing (the *lex rei sitae*),

(t) Westlake, *op. cit.*, § 162.

(u) See chapter 31, § 2.

(a) Assumed in chapter 21, § 2, and discussed and applied in the present § 2, and in chapter 30. In the case of land it is practically inevitable that a court in one country, in so far as it is concerned at all with the title to land or the right to possession of land situated in another country, shall regard as conclusive whatever a court of that country has decided or would decide with regard to title or right to possession: *cf.* the concluding sub-division of the present § 2. Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 253, bases the general rule "upon principles of obvious social convenience", and says: "Clearly the physical object in question can not as 'land' be removed outside the borders of the state or country in which it is physically situated. One can, of course, 'sever' a portion of the 'land' and thereby convert it into a 'chattel or 'movable', and then transport it elsewhere. So long, however, as it remains 'land' it must remain within the borders of a given state; consequently under the territorial organization of modern society, only the appropriate officers of the government of the state in question may lawfully deal physically with it. This being so, if the question as to who owns or is entitled to the possession of a piece of 'land' in one state is raised in the courts of another state, it seems obvious that it is desirable or convenient for the court in this other state to inquire what the courts of the state where the 'land' is would say about the matter, and thereby bring about uniformity of decision." It is assumed for the purpose of the present chapter that there is a distinction between an interest in land and a personal right with respect to land. Whether the distinction is a real one will be discussed in chapter 30, § 2.

applies in the case of immovables (land) not only to transfer by particular assignment *inter vivos* (b), but also to the administration of the estate of a deceased person (c) and succession to the beneficial interest in things comprised in his estate. In the case of movables, on the other hand, while jurisdiction to administer is based upon the situs of the assets and the course of administration is governed to a large extent by the domestic *lex fori*, succession on death, as distinguished from transfer *inter vivos*, is governed by the *lex domicilii* of the *de cuius* in the sense that the forum of administration distributes the beneficial surplus among the beneficiaries ascertained by reference to the *lex domicilii* (d); and by analogy, or perhaps merely as a matter of customary language, intangible things may for these purposes be treated as if they were movables (e).

The meaning of references by the conflict rules of the forum to the *lex rei sitae* and the *lex domicilii* respectively may give rise to questions which are discussed elsewhere (f). In any event, it is obvious that in connection with succession on death it is essential to distinguish between immovables and movables (g), the characterization or classification of things as immovable and movable and of interests in immovables and movables respectively being made in accordance with the *lex rei sitae* (h). Furthermore, in domestic English law, and Anglo-American law generally, the distinction between real property and personal property is well known and the distinction between immovables and movables is unknown (i); but the latter distinction is well known in English and Anglo-American conflict of laws, and is the usual basis for the selection of the proper

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(b) See chapter 30.

(c) This is generally true, by reason of the fact that the situs of an immovable thing coincides with the forum of administration, but, as already pointed out, there may be cases in which the *lex fori* must be distinguished from the *lex rei sitae*, because the forum, in administering in accordance with its own law things situated within its jurisdiction, may take into consideration interests in things situated in another country.

(d) See chapter 32.

(e) See chapters 20 and 32.

(f) As to the *lex rei sitae* see the concluding subdivision of the present § 2. As to the *lex domicilii*, see the cross-references there given.

(g) See chapter 21, § 1.

(h) See chapter 4, § 7, and chapter 21, § 2.

(i) As to these two distinctions, see chapter 21, § 1.

law relating to things and interests in things (*j*). Of course when the proper law has been selected on this basis, if the domestic rules of that law are to be applied, and they draw the distinction between real property and personal property, that distinction is material in the application of the proper law (*k*).

## (2) *Intrinsic Validity of Will.*

The intrinsic validity of a will of immovables is governed by the *lex rei sitae*. Thus, for example, the question whether a will of immovables is void because it contravenes any rule against perpetuities or against accumulation of income (*l*), or any rule prohibiting gifts in mortmain or for charitable uses (*m*), depends on the *lex rei sitae*.

The question whether a testator has complete disposing power without regard to the claim of his wife or children or has merely a disposing power subject to their receiving certain "compulsory shares" or "legitimate portions" (*n*) would appear to be a matter of succession law (specifically a matter of intrinsic validity of a will) and therefore should be governed by the *lex domicilii* as regards movables (*o*) and by the *lex rei sitae* as regards immovables (*p*).

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(*j*) This is a general and desirable rule, and departure from its is likely to cause confusion: see chapter 21, § 1, notes (*p*), (*q*) and (*r*).

(*k*) This point is illustrated in the subsequent discussion in the present § 2.

(*l*) *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461.

(*m*) *Duncan v. Lawson* (1889), 41 Ch. D. 394; *In re Hoyles*, [1911] 1 Ch. 179. As to *Duncan v. Lawson*, see Cook's comments quoted in chapter 21, § 1, note (*s*).

(*n*) A feature of the laws of various countries of continental Europe.

(*o*) See, e.g., *In re Pryce*, [1911] 2 Ch. 286 (Holland); *In re Annesley*, [1926] Ch. 692 (France); *In re Ross*, [1930] 1 Ch. 377 (Italy). As to the question of the *renvoi* discussed in the *Annesley* and *Ross* cases, see chapters 7, 8 and 9. In French conflict of laws the limitation on the disposing power of a testator is characterized, not as a matter of personal testamentary capacity governed by the testator's national law, but as a matter of succession governed as regards movables by the law of the testator's domicile (not by his national law as inaccurately stated in the *Annesley* case): see chapter 7, §§ 3 and 4.

(*p*) Story, *Conflict of Laws*, §§ 455, 474, cited by Cheshire, *Private International Law* (2nd ed. 1938) 550. A case involving the question of disposing power as regards both movables and immovables is *In re Ross*, [1930] 1 Ch. 377 (rightly applying the *lex rei sitae*

By analogy, it would seem that modern statutes which in various Anglo-American countries have conferred upon courts power to make provision out of a testator's estate for his dependants in excess of what the testator has given them by his will should be characterized as being in effect limitations on the testator's disposing power, and therefore governed by the *lex rei sitae* as regards immovables and by the *lex domicilii* as regards movables. In other words, a statute of this kind should apply to immovables of the testator situated within the territory of the enacting legislature, without regard to his domicile, and should apply to all movables of a testator domiciled within that territory, without regard to the situs of the movables. That is to say, a court of the situs of any assets, in making provision for dependants, should take into consideration the immovables situated within its territory and the movables wherever situated of a testator domiciled within its territory (q).

The selection of the law governing the disposing power of a testator may give rise to problems in connection with powers of appointment. If S (settlor, donor of the power) by his will confers on A (appointor, donee of the power) a power of appointment exercisable by will (r), the problem is especially complicated in the case of movables, and depends partly on the distinction between a general power and a special power. Assuming that S had sufficient disposing power by the law of his domicile as regards all the movables included in the power, A must also have sufficient disposing power by the law of his domicile in order to exercise a general power in such a way as to make all the movables included in the appointment assets of his estate for all purposes; but if the power is a special one, only S's disposing power is material, because A's appointment

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in the sense of the law which a court of the situs would apply, but wrong in its application of the *lex domicilii*: see chapter 7, § 6(5) (b).

(q) For fuller discussion, see chapter 36, with references to some British Columbia and Saskatchewan cases and to *Parish v. Parish*, [1924] N.Z.L.R. 307, 18 Can. Bar Rev. 451, *In re Roper*, [1927] N.Z.L.R. 731, 18 Can. Bar Rev. 456, and *In re Butchart*, [1932] N.Z.L.R. 125, 18 Can. Bar Rev. 466-467, in which the theory is explicitly stated and applied. The view stated in the text is inconsistent with the relevant statutes of England and Ontario because the English statute clearly, and the Ontario statute obscurely, limit relief to cases in which the testator was domiciled in England or Ontario, as the case may be, with far from satisfactory results.

(r) The power might be conferred by a settlement *inter vivos*, and might by its terms be exercisable by A in his lifetime, but the example in the text has been purposely limited.

amounts merely to the nomination of the persons who are to take under S's will (s). At first sight the problem may seem relatively simple with regard to immovables, because S's disposing power and A's disposing power are governed by one law, the *lex rei sitae*. Perhaps the appearance of simplicity disappears, however, when it is considered that the *lex rei sitae* may define S's disposing power with due regard to the value of other immovables or even movables comprised in his estate, and may define A's disposing power with due regard to the value of other immovables and even movables comprised in his estate (t).

### (3) *Formal Validity of Will.*

The formal validity of a will of any interest in immovables is governed by the *lex rei sitae* (a), subject, as regards formal validity, to the exceptions created by Lord Kingsdown's Act; and, subject to the same exceptions, it is the distinction between interests in immovables and interests in movables and not the distinction between real property and personal property that is material for the purpose of the selection of the proper law of succession (b).

As regards the formal validity of a will of "personal estate" made by a British subject outside the United Kingdom, s. 1

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(s) *In re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286, and cases there discussed. The subject of powers of appointment is extraordinarily complicated in the conflict of laws, and various aspects are discussed in Westlake, *Private International Law*, § § 91 ff.; Dicey, *Conflict of Laws*, rules 198-202; Cheshire, *Private International Law* (2nd ed. 1938) 527 ff.; Mulford, *Conflict of Laws and Powers of Appointment* (1939), 87 U. of Penn. L. Rev. 403. The statutory provisions which have to be considered are, in England, the Wills Act, 1837, ss. 9, 10 and 27, re-enacted in Ontario (R.S.O. 1937, c. 164, ss. 11(1), 12 and 29) and in some other provinces of Canada. In the uniform Wills Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada in 1929, and adopted in Saskatchewan (1931) and in Manitoba (1936), the corresponding sections are 6, 8 and 23. See R.S.S. 1940, c. 110, and R.S.M. 1940, c. 234.

(t) It would seem to be immaterial for this purpose whether the limitations imposed on S's or A's disposing power by the *lex rei sitae* provide that the dependents are entitled to definite compulsory shares or legitimate portions or confer on a court discretionary power to make provision for dependants in excess of what the testator has given them.

(a) *Coppin v. Coppin* (1725), 2 P. Wms. 291; *Pepin v. Bruyère*, [1902] 1 Ch. 24, 7 Brit. R.C. 454.

(b) As to this general rule, see especially chapter 21, § 1, notes (p), (q) and (r).

of Lord Kingsdown's Act (*b*) passed in 1861 by the Parliament of the United Kingdom, permits the use of the forms required by the law of the place of making or by the law of the domicile of the testator at the time of making or by the law of the domicile of origin of the testator within the British dominions, and if the will is made within the United Kingdom, s. 2 of the statute permits the use of the forms required by the law of the place of making (*c*). It is obvious that the British Parliament, using the inaccurate language of older judgments and older text writers, said "personal estate" when it meant "movables," but in England, and in other parts of the British Empire in which the statute has been adopted, the statute has been construed literally, with strange results. The statute applies of course to all interests in movables, as regards which it was reasonable to permit, facultatively or alternatively, some forms other than those required by the law of the domicile at the time of the testator's death, but it also applies to some interests in immovables and not to others, without regard to the substantial reasons which exist for recognizing the dominant control of the *lex rei sitae* with regard to all interests in land. Thus, under the statute the fact that a particular interest in land is classified in domestic English law as personal property (*d*), as, for example, a leasehold estate, or the interest of a mortgagee (*e*), or the interest of a beneficiary in real property held upon trust for conversion into money, may be material to the selection of the proper law, because while in its character as an interest in land the succession to it is governed by the *lex rei sitae*, including the rules of that law with regard to both formal and intrinsic validity of wills, in its character as personal property it falls within the statute, so that a testator, as regards formalities only, may use any of the alternatives permitted by the statute. On the other hand, if the particular interest is classified as real property, both formal and intrinsic validity are governed exclusively by the *lex rei sitae*. In other words, whereas the general rule is that only the distinction between immovables and movables is material to the selection of the proper law of

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(*b*) The whole statute is reprinted, with comments, in chapter 23.

(*c*) Any of these laws may be construed alternatively as meaning the domestic rules or the conflict rules of that law, in order to uphold in point of form a will which is intrinsically valid. See *In re Lacroix* (1877), 2 P.D. 94, discussed in chapter 8, § 6, and chapter 9, § 5.

(*d*) See chapter 21, where such interests are discussed.

(*e*) See chapter 25.

succession, an exception has to be made in the case of certain interests in immovables. Only Saskatchewan and Manitoba have rid themselves of the illogical features of Lord Kingsdown's Act, by adopting the uniform Wills Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada in 1929. This uniform statute contains a revised version of Lord Kingsdown's Act, limiting the alternative forms to wills of movables (*f*).

Apart from Lord Kingsdown's Act the general rule (*g*) is that the proper law of succession is selected solely on the basis of the distinction between interests in immovables and interests in movables, and the fact that a certain interest in land is classified as personal property does not make applicable the *lex domicilii*, but if the *lex rei sitae* is selected as the proper law because an interest in land is in question, and the proper law is one which recognizes the distinction between realty and personalty, then in the application of the proper law the interest in question will descend or devolve according to its nature as realty or personalty, as the case may be (*h*).

#### (4) *Various Questions of Succession.*

A widow's claim to dower in her husband's land or other analogous right to the "homestead" conferred by statute is a matter of succession law, governed by the *lex rei sitae* (*a*).

Various kinds of cases occur in the borderland between succession law and other departments of law, but usually accurate characterization of the question involved indicates to what department the question belongs and leads to the selection of the proper law. For example, in *Udny v. Udny* (*b*) the land was situated in Scotland, and by the succession law of Scotland

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(*f*) More recently I have ventured to subject this revised version to further revision, and in chapter 23, § 2, my proposed new version is submitted.

(*g*) As to this general rule, see especially chapter 21, § 1, notes (*p*), (*q*) and (*r*).

(*h*) See, e.g., *Duncan v. Lawson* (1889), 41 Ch. D. 394, at p. 398; *In re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192, at p. 200. The latter case was distinguished, wrongly it is submitted, in *In re Cutcliffe's Will Trusts*, [1940] Ch. 565; see comment in chapter 29. See also Beale, *Conflict of Laws*, vol. 2 (1935) 932 ff.; Johnson, *Conflict of Laws*, vol. 3 (1937) 15-26.

(*a*) *In re Elder* (1936), 44 Man. R. 84, [1936] 3 D.L.R. 422, [1936] 2 W.W.R. 70.

(*b*) (1869), L.R. 1 H.L.Sc. 441, 9 R.C. 782.

the person entitled to the entailed estate of Udney was the eldest legitimate son, including a son born before the marriage of his parents but legitimated by their subsequent marriage, and the only controverted question was whether the respondent had been so legitimated, a question of status governed by the law of the domicile of his father (c). In *Birtwhistle v. Vardill* (d), on the other hand, the land was situated in England and the claimant as heir at law was a son born before the marriage of his parents, but legitimated by their subsequent marriage under the law of his father's domicile. His status as a legitimated child was beyond dispute (e), and the only controverted question was whether by the succession law of England a legitimated child was entitled to take, the decision being that by that law the person entitled to a freehold estate on intestacy was the eldest legitimate son, excluding a son legitimated by the subsequent marriage of his parents (f).

Again, the selection of the proper law may depend upon the distinction between succession law and marriage law (g). If by virtue of an express ante-nuptial contract (h) or by virtue of

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(c) Thus the respondent succeeded to the estate because he fulfilled the requirements of the *lex rei sitae* (the proper law of succession to land, defining the classes of persons entitled to succeed) and also fulfilled the requirements of the *lex domicilii* of his father (the proper law governing the respondent's status) so as to bring himself within the succession rules of the *lex rei sitae*.

(d) (1840), 7 Cl. & F. 895, 5 R.C. 748.

(e) The father was domiciled in Scotland both at the time of the son's birth and at the time of the subsequent marriage, so that the claimant fulfilled the requirements of what Scott L.J. in *In re Luck's Settlement Trusts*, [1940] Ch. 323, called the *Wright-Grove* rule: cf. comment on the *Luck* case in chapter 39.

(f) This decision and the decision in *Udney v. Udney*, *supra*, are in accord with the distinction drawn in chapter 4, § 8, between status, on the one hand, and the consequences or incidents of status and capacity, on the other. The rule in *Birtwhistle v. Vardill* does not apply to movables either in cases of intestacy (*In re Goodman's Trusts* (1883), 17 Ch. D. 266) or in a case of a bequest to a child (*In re Andros* (1883), 24 Ch. D. 637). Even as regards immovables, the legitimated child may take real property under a devise to a child (*In re Grey's Trusts*, [1892] 3 Ch. 88) or personal property (e.g. a leasehold estate in land) either on intestacy or under a bequest to a child (Westlake, *Private International Law*, § § 126, 178). As to the present English law, see Cheshire, *Private International Law* (2nd ed. 1938) 393-394; cf. (1927), 43 L.Q.R. 22. As to the present law in Ontario, see chapter 4, § 8, and chapter 39.

(g) See chapter 4, § 5.

(h) *Taillefer v. Taillefer* (1891), 21 O.R. 337 (express contract as to both movables and immovables); cf. *Re Tremblay*, [1931] O.R. 781.

a contract implied by the law of the domicile of the parties at the time of the marriage, in the absence of an express contract, community of property is created between the parties (*i*), it would seem to be plain on principle that the fact that the parties subsequently change their domicile cannot have the effect of depriving either of them of whatever proprietary rights he or she acquired as a result of their marriage and their express or implied contract (*j*). The question whether the contract covers immovables as well as movables depends of course upon the terms of the contract. In the case of a contract implied by French law (the *lex domicilii*) it was held that immovables situated in England were included (*k*).

As in the case of an express or implied ante-nuptial contract providing for community of property, so in the case of any such contract negating community property or providing that the parties shall be separate as to property, their subsequent change of domicile will not affect their respective proprietary rights acquired or retained on the occasion of their marriage. In either case, that is, whether there is community of property or not, on the death of either party the rights of succession of the survivor are governed as regards movables by the *lex domicilii* at the time of death and as regards immovables by the *lex rei sitae*. The result, if the parties were separate as to property, is that the survivor retains his or her separate property and succeeds to a share in the other party's estate as defined by the proper succession law (*l*), and, if there was community of

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(*i*) As, e.g., by the law of Quebec: *cf. McMullen v. Wadsworth* (1889), 14 App. Cas. 631.

(*j*) So held, as regards movables, in *DeNicols v. Curlier*, [1900] A.C. 21, in the case of parties domiciled in France at the time of their marriage without marriage contract; *cf. Re Parsons*, [1926] 1 D.L.R. 1160 (Ont.).

(*k*) *In re DeNicols; DeNicols v. Curlier*, [1900] 2 Ch. 410. Cheshire, *Private International Law*, (2nd ed. 1938) 567, doubts whether by French law the implied contract covers foreign immovables. Westlake, *op. cit.*, § 36a, preferred to justify the decision on the ground that the interests in the land situated in England "represented the investment of the money acquired during the marriage, which the House of Lords had practically declared to have been subject to community" (5th ed. 1912, p. 80), and left unaltered his § 35 (The effect of marriage on English land, in the absence of express contract, is governed by the law of England, without reference either to the domicile of the parties or to the place of celebration of the marriage). In the later editions, published since Westlake's death, § 35 has been rewritten in accordance with the decision in the *DeNicols* case.

(*l*) In effect this is what was decided in *Lashley v. Hog* (1804), 4

property, the survivor retains his or her portion of the common property, partitioned in consequence of the death of the other party, and succeeds to such share in the other party's portion of the common property as is conferred by the proper succession law (*m*).

The proprietary rights acquired or retained by either of the parties on the occasion of their marriage may of course be affected by subsequent transactions taking place during the lifetime of the parties. Community property may be wholly or partially lost in the course of its administration by the husband, if the proper law confers powers of administration upon him, and the law of bankruptcy may confer rights upon creditors against the property of either or both of the common owners (*n*). A more difficult question arises if the parties are forbidden by the law of their matrimonial domicile from conferring benefits *inter vivos* upon each other, as, for example, under article 1265 of the Civil Code of Lower Canada, and a transaction in contravention of this prohibition takes place in another country. In *Landreau v. Lachapelle* (*o*), it was held that a married woman domiciled in Quebec could validly transfer land situated in Ontario to herself and her husband as joint tenants, with the consequent sole right of the survivor under Ontario law.

#### (5) *Revocation of Will.*

The revocation of a will (apart from "revocation" by the subsequent marriage of the testator) is a matter of succession, governed as regards a will of immovables by the *lex rei sitae*, subject to the exceptions created by Lord Kingsdown's Act as regards any interest in land which is characterized as personal property (*p*). In Ontario, for example, it is provided by the Wills Act, R.S.O. 1937, c. 164, s. 22, that no will shall be revoked otherwise than by the subsequent marriage of the testator, or by a will or other instrument executed in the manner required by the statute for the execution of wills, or by burning, tearing or otherwise destroying the will by the testator or by

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Paton 581, which was distinguished in *DeNicols v. Curlier*, *supra*; *cf.* chapter 4, § 5.

(*m*) *Beaudoin v. Tradel*, [1937] O.R. 1, [1937] 1 D.L.R. 216.

(*n*) See Foote, *Private International Law* (5th ed. 1925) 349-350.

(*o*) [1937] O.R. 444, [1937] 2 D.L.R. 504. The case is discussed in chapter 31, § 3.

(*p*) As to ss. 1 and 2 of Lord Kingsdown's Act, see the present § 2(3), *supra*.

some person in his presence and by his direction with the intention of revoking the will. A will made in accordance with the Wills Act, that is, in accordance with the domestic rules of Ontario law, is valid in point of form as regards any interest in land situated in Ontario, whether it be real property or personal property. It may be revoked as regards both realty and personalty by its being burnt, torn or otherwise destroyed by the testator or in his presence and by his direction with the intention of revoking it, or by a will or other instrument executed in the manner prescribed for the execution of wills by the domestic rules of Ontario law, or by the subsequent marriage of the testator. Otherwise it remains unrevoked as regards any interest in land situated in Ontario which is classified as real property, notwithstanding that the testator, domiciled in Ontario at the time of the making of the will, dies domiciled in Quebec, having made a holograph will purporting to revoke all former testamentary dispositions made by him (*q*). The holograph will, admittedly valid according to the domestic rules of Quebec law, is invalid in Ontario as regards any interest in land situated in Ontario which is classified as real property, but may by virtue of Lord Kingsdown's Act be valid in Ontario as regards any interest in land situated in Ontario which is classified as personal property. The question whether a devisee under the Ontario will to whom a gift is made by the Quebec will is put to his election, and the question whether the doctrine of dependent relative revocation applies, would be governed by the law of Quebec, the *lex domicilii* (*r*).

The question whether a will is "revoked" or rendered null by the subsequent marriage of the testator raises again the distinction between succession law and marriage law. As regards a will of movables it has been held in England that the question whether the will is revoked by the subsequent marriage

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(*q*) *Re Howard* (1923), 54 O.L.R. 109, [1924] 1 D.L.R. 1062. The question is discussed learnedly and acutely by Orde J., and the only criticism that might be made is that in some passages in which Lord Kingsdown's Act is not in question the learned judge states the main conflict rules as to the making of wills—the *lex rei sitae* as to immovables, and the *lex domicilii* as to movables—in terms of realty and personalty. Apparently, however, the result was not affected by this error, the interests in land situated in Ontario in question in the case all being real property.

(*r*) *Re Howard*, *supra*; cf. *Re Teale* (1923), 54 O.L.R. 130; *In re Colville Estate* (1931), 44 B.C.R. 331, [1931] 3 W.W.R. 26, [1932] 1 D.L.R. 47 (see chapter 23). As to the doctrine of election, see further discussion in § 2(6), *infra*.

of the testator is a matter of matrimonial law, governed by the law of the domicile of the testator at the time of the marriage (*s*), and not as a matter of testamentary law, governed by the law of the domicile of the testator at the time of death, whereas the Conflict of Laws Restatement of the American Law Institute (*t*) characterizes it as a matter of testamentary law. As regards a will of immovables, the Restatement (*u*) makes applicable the *lex rei sitae*, consistently with its theory relating to a will of movables. It is not clear whether an English court would apply the *lex domicilii* at the time of marriage to a will of land, or would apply the *lex rei sitae*, but it is submitted that on principle the *lex rei sitae* should be the governing law (*v*).

(6) *Change of Domicile; Construction of Will; Election.*

Section 3 of Lord Kingsdown's Act (*a*) is as follows:

No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

It will be observed that this section of the statute, unlike the earlier sections (*b*), is not expressly limited to the will of a British subject or to a will of "personal estate" or to questions of formal validity, and opinions differ widely as to the scope and meaning of the section. Broadly speaking, one view is that in the light of the context in which s. 3 appears and the title of the statute (An Act to Amend the Law with Respect to Wills of Personal Estate made by British Subjects), s. 3 should be read as if it began with the words "no such will" and as being merely supplementary to ss. 1 and 2 (*c*); and

(*s*) *In re Martin, Loustalan v. Loustalan*, [1900] P. 211.

(*t*) § 307, Illustration 2.

(*u*) § 250, Comment.

(*v*) For further discussion, see chapter 4, § 5; cf. *Re Howard*, *supra*.

(*a*) For the complete text of this statute, see chapter 23.

(*b*) Sections 1 and 2 are discussed in the present § 2(3), *supra*, under the heading Formal Validity of Will. Some of the complications introduced into English conflict of laws by the use in the statute of the words "personal estate" are discussed in § 2(3), and in chapter 23, and other chapters.

(*c*) See Cheshire, *Private International Law* (2nd ed. 1938) 520 ff.; Morris, *The Choice of Law Clause in Statutes* (1946), 62 L.Q. Rev. 174, 175.

another view is that s. 3 should be read as if it were in effect an independent enactment, without importing into it limitations implied from the terms of ss. 1 and 2 or of the title (*d*).

If s. 3 is read as an independent enactment, it makes an important change in English conflict rules relating to a will of movables in that a will that complies with the law of the testator's domicile at the time of the making of the will is valid notwithstanding that it does not comply with the law of his domicile at the time of his death, although of course any will made after the testator's change of domicile must comply with either the law of his then domicile or the law of his domicile at the time of his death. As regards the construction of a will of movables, it would seem to be a reasonable rule that especial regard should be had to the law of the domicile of the testator at the time of the making of the will rather than at the time of his death, and, if statutory authority is needed to support such a rule (*e*), it is desirable that s. 3 should not be limited to wills validated by ss. 1 and 2. Resort to the law of the domicile may be excluded by sufficient express or implied indication contained in the will that the testator desired the will to be construed by some other law (*f*).

As regards a question of validity, as distinguished from one of construction, s. 3 is inapplicable to a will of an interest in land, whether that interest is classified as real property or personal property (*g*), except so far as the will is rendered formally valid by s. 1 as a will of personal estate made in accordance

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(*d*) See Westlake, *Private International Law*, §§ 85 and 86. Dicey, *Conflict of Laws* (5th ed. 1932) 820 ff., rule 197, would limit the operation of s. 3 to a will made by a British subject or by an alien who dies domiciled in England.

(*e*) In favour of the law of the domicile at the time of the making of the will, see Westlake, *op. cit.*, § 123, and Dicey, *op. cit.*, rule 196. See also *Re Bessette*, [1942] O.W.N. 278, [1942] 3 D.L.R. 207. Except in the case of a will validated by Lord Kingsdown's Act, Cheshire, *op. cit.*, pp. 532-534, seems to prefer the law of the testator's domicile at the time of his death, although at p. 553, with regard to a will of land, he expresses his view in favour of the *lex domicilii* at the time of the making of the will.

(*f*) See, e.g., *In re Cunningham*, [1924] 1 Ch. 68. In this case the will was construed by the law of the domicile at the time of death, but, as in some other cases in which it has been said that resort should be had to that law, there was no suggestion that there had been any change of domicile between the time of the making of the will and the death. See, e.g., *In re Ferguson's Will*, [1902] 1 Ch. 483.

(*g*) As to the classification of interests in land, see chapter 21.

with the law of the testator's domicile at the time of the making of the will (*h*).

As regards matters of construction, however, s. 3 may apply to a will of land, because it would appear that a will of land, so far from being construed with exclusive reference to the *lex rei sitae*, should be construed with due regard to any circumstances which throw light on the intention of the testator, and that while a stringent rule of the *lex rei sitae* cannot be disregarded and the use of technical terms of land law may require a reference to the *lex rei sitae* (*i*), the most important element is the domicile of the testator (*j*). Domicile, so far as it is material in this connection, should mean domicile at the time of the making of the will, in accordance with what s. 3 in effect provides, if it is read as an independent enactment.

It may happen that a will which is valid as regards movables, but invalid as regards land, may nevertheless affect land in the sense that the will may be read against a person to whom a bequest is made so as to compel him to elect between the benefit given to him by the will and the interest to which he is entitled as heir of land by reason of the invalidity of the will as regards land. The question whether a person is put to his election has been held to be a matter governed by the law of the testator's domicile (*k*), and it would seem that the question should be characterized as one of intrinsic validity of a will, and not one of construction of a will. The difference of characterization is important, because if the question is one merely of construction the governing law would be the law intended by the testator to govern and not necessarily the law of the domicile (*l*).

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(*h*) See § 2(3), *supra*.

(*i*) *Cf. Studd v. Cook* (1883), 8 App. Cas. 577; distinguished in *In re Miller*, [1914] 1 Ch. 511.

(*j*) *Cf. Dicey, Conflict of Laws* (5th ed. 1932), exception 6 to rule 150; *Cheshire, Private International Law* (2nd ed. 1938) 551 ff.; *Westlake, Private International Law*, § 170.

(*k*) See discussion in *Cheshire, op. cit.*, 556-561; *cf. Westlake, op. cit.*, § § 125, 125a and 125b; *Dicey, Conflict of Laws*, appendix, note 25 (Questions where Deceased leaves Property in Different Countries); *In re Ogilvie*, [1918] 1 Ch. 492; *Brown v. Gregson*, [1920] A.C. 860. See also *Re Howard* (1923), 54 O.L.R. 109, [1924] 1 D.L.R. 1062, in note (r) in § 2(5), *supra*.

(*l*) In *In re Allen*, [1945] 2 All E.R. 264, 114 L.J. Ch. 298, 173 L.T. 198, the question of election was held to be one of construction, governed by English law and not by the law of the domicile (South Africa). That this decision is wrong is effectively demonstrated by *Morris* in a comment (1946), 24 Can. Bar Rev. 528.

(7) *Escheat and Bona Vacantia.*

Escheat and *bona vacantia* are both governed by the *lex rei sitae*. Escheat, which applies only to real property, is the right whereby land of which there is no longer any tenant returns, by reason of tenure, to the lord by whom or by whose predecessor in title the tenure was created. It is not strictly speaking a reversion nor is it accurate to speak of the lord as taking by way of succession or inheritance from the tenant (*m*). In the case of *bona vacantia*, the Crown takes, not by succession to the deceased owner, but by virtue of its right to things which have no other owner. Therefore movables situated in England left by a person who died domiciled in Austria, intestate and without next of kin, were held to be the property of the Crown as against the claim of the Austro-Hungarian government that it was entitled by way of succession under the law of the domicile (*n*).

(8) *The Law of the Situs and the Renvoi.*

The ambiguities inherent in a statement contained in a conflict rule of the law of the forum, that a given question is "governed" by the "law" of a particular country have been discussed in chapter 2, and the related problem of the *renvoi*, with special regard to succession to movables and a reference by a conflict rule to the law of the domicile, has been discussed in chapters 7, 8 and 9.

While there would seem to be no justification for the adoption of the doctrine of the *renvoi* as a general principle applicable indiscriminately to all kinds of cases, a reference by a conflict rule to the law of the situs of land as the law governing title is exceptional in that a reference to the law of a foreign situs should be construed as meaning whatever a court of the foreign situs has decided or would decide, the forum applying in effect a theory of total *renvoi* (*o*). The basis of the conflict rule referring to the *lex rei sitae* is social convenience or practical necessity (*p*). Owing to the fact that in nearly all countries

(*m*) *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767, at p. 772; 11 Halsbury, Laws of England (1910) 23.

(*n*) *In re Burnett's Trusts*, [1902] 1 Ch. 847; cf. *In the Estate of Musurus*, [1936] 2 All E.R. 1666.

(*o*) As to the meaning of "total *renvoi*", see chapter 9, § 1. As to the exceptional treatment of questions of title to foreign land, see chapter 8, § 6, and chapter 9, § 5.

(*p*) See quotation from Cook in the first footnote in § 2(1), *supra*.

questions of title to land are governed by the *lex rei sitae*, the usual result is that any court that resorts to the foreign *lex rei sitae*, including the conflict rules of that law, applies the domestic rules of that law. It may happen, however, that the conflict rules of the *lex rei sitae* refer to some other law, which must accordingly be applied by a court in another country. In Italy, for example, questions of succession to land are governed by the national law of the *de cuius* and the doctrine of the *renvoi* is rejected. In the case of a British subject or American citizen dying domiciled in Italy, owning land in Italy, an Anglo-American court, not being able to give effect to the Italian conflict rule, would probably apply domestic Italian law (*q*), a result which would be satisfactory from a practical point of view. Again, the statutory conflict rules of Palestine refer the question of succession to "mulk" land situated in Palestine to the national law of the *de cuius*, but provide that effect shall be given to a reference back from the national law to the *lex rei sitae* (Palestine), with the result that the domestic rules of the *lex rei sitae* are applicable (*r*).

The principle that, as regards the title to land, not only the governing law is the *lex rei sitae*, but also that the *lex rei sitae* means whatever law a court of the situs would apply, whether that be the domestic law of the situs or any other law selected in accordance with the conflict rules of the situs, applies by virtual necessity to matters of either formal or intrinsic validity of wills of immovables, succession to immovables on intestacy, and to transactions *inter vivos*. Even the American Law Institute Restatement of the Conflict of Laws, which in § 7 rejects the doctrine of the *renvoi* and states a theory of characterization in accordance with the *lex fori* (*s*), says in § 8(1) that all questions of title to land are decided in accordance with the law of the state where the land is, including the conflict of laws rules of that state. Owing to the fact that courts in one country usually refuse to exercise jurisdiction with regard to the title of land situated in another country (*t*), it does not often happen that a court is concerned with the

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(*q*) See especially chapter 9, § 4.

(*r*) See chapter 10.

(*s*) Inconsistently with the theory of acquired rights or jurisdiction to create rights stated in various sections of the Restatement.

(*t*) See chapter 30, § 3.

*renvoi* as regards the title to land (*u*), but, on the other hand, courts are perhaps too much inclined to exercise jurisdiction *in personam* on the ground of a contractual obligation binding the defendant, and relating to land situated abroad, and come perilously close to adjudicating on the title to the land inconsistently with the *lex rei sitae* (*v*).

It would seem that § 8(1) of the Conflict of Laws Re-statement, cited above, states a rule only for a court other than that of the situs of the land. For this purpose a reference by a conflict rule of the forum to the *lex rei sitae* indicates whatever domestic rules would be applied by a court of the situs by virtue of the conflict rules of the *lex rei sitae*. On the other hand, a court of the situs will of course apply the conflict rules of the *lex rei sitae*, and a reference by a conflict rule of the *lex rei sitae* to the *lex rei sitae* necessarily indicates the domestic rules of the *lex rei sitae*. Whether the case is one in which the relevant conflict rule of the *lex rei sitae* does or should refer to the domestic *lex rei sitae* or to some other domestic law, is another question, and a court of the situs sometimes applies the domestic rules of the *lex rei sitae* without sufficient or any consideration of this question. The fact that it commonly happens that the domestic rules of the *lex rei sitae* are rightly applied should not be allowed to obscure the possibility that the case is one to which under the conflict rules of the *lex rei sitae* the domestic rules of some other law should be applied (*w*).

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(*u*) A rare example of a court directly adjudicating on the title to land situated abroad is the case of *In re Ross*, [1930] 1 Ch. 377, in which the *lex rei sitae* (Italy) is itself a rare example of a law containing a conflict rule referring not to the *lex rei sitae*, but to the *lex patriae*, even as regards succession to land.

(*v*) See chapter 30, § 3.

(*w*) Cf. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942) 252, at pp. 263 ff. See, further the discussion of *Landreau v. Lachapelle*, [1937] O.R. 444, [1937] 2 D.L.R. 504, in chapter 31, § 3.

## CHARTER XXIII.

### LORD KINGSDOWN'S ACT\*

- § 1. The Wills Act, 1861, p. 469
- § 2. A redraft of Lord Kingsdown's Act, p. 474.
- § 3. Postscript, p. 476.

#### § 1. The Wills Act, 1861.

In *Re Colville Estate (a)* decided by Macdonald J. in the Supreme Court of British Columbia, the testator, a British subject, having his domicile of origin in Scotland, and being resident, and perhaps domiciled, in British Columbia, made in British Columbia a will in the usual British Columbia form (that is, in the form prescribed in England by the Wills Act, 1837, re-enacted in the British Columbia Wills Act). By this will he purported to dispose of his real and personal property, and the only question was whether, or to what extent, this will was effectively revoked by a later holograph will made by the testator in California after his acquisition of a domicile of choice there. The holograph will was, as regards form, valid by the domestic law of California, and by it the testator purported to revoke all previous wills made by him, and to dispose of his real and personal property inconsistently with the provisions of the earlier will. After the making of this will the testator was naturalized in the United States and therefore ceased to be a British subject.

The result of the judgment of Macdonald J. may be stated as follows:

(1) The holograph will was ineffective to revoke the earlier will as regards real property in British Columbia.

(2) The holograph will was effective to revoke the earlier will as regards personal property in British Columbia.

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\*This chapter is a substantially rewritten version of a comment, published [1932] 1 Dominion Law Reports 53-57, to which have now been added a suggested revised version of Lord Kingsdown's Act and a postscript.

(a) (1931), 44 B.C.R. 331, [1931] 3 W.W.R. 26, [1932] 1 D.L.R. 47.

On the first point Macdonald J. followed the decision of Orde J. in *Re Howard* (b), and adopted the reasons for judgment in that case. On the second point he held that the holograph will was valid in British Columbia as regards personal property by virtue of the statute commonly known as Lord Kingsdown's Act, s. 1 of which was re-enacted, *mutatis mutandis*, in British Columbia by the Wills Act Amendment Act, 1924, s. 2. The latter section provides, *inter alia*, that a will made outside of British Columbia by a British subject according to the form required by "the law of the place where the testator was domiciled when the same was made" shall, "as regards personal property, be held to be well executed for the purpose of being admitted to probate" in British Columbia. It was held that the statute does not require the testator to be a British subject at the time of his death, provided he was a British subject at the time of the making of the will.

The following is the text of the statute, 24 & 25 V. c. 114, enacted by the Parliament of the United Kingdom. By virtue of the Short Titles Act, 1896, the statute may be cited as the Wills Act, 1861, but it is usually referred to as Lord Kingsdown's Act:

An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

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(b) (1923), 54 O.L.R. 109, [1924] 1 D.L.R. 1062, discussed in chapter 22, § 2(5).

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

4. Nothing in this act contained shall invalidate any will or testamentary instrument as regards personal estate which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act.

In *Bremer v. Freeman* (c), the testatrix was domiciled (in the English sense) in France, although she had not obtained the authorization of the French government to establish a domicile in France. She made, in France, a will in English form, but not in any local French form. It was held that the will was invalid as regards movables in England. In *Hamilton v. Dallas* (d), it was stated, in argument, that the decision in *Bremer v. Freeman* "was received with such alarm that it gave rise to the Act 24 & 25 Vict. c. 114" In *Re Dartnell* (e), it was said that Lord Kingsdown's Act was passed "to obviate difficulties which arose from the previous decision of Sir H. J. Fust that a person in order to make a valid will must conform to the law of the country where he is domiciled: *Craigie v. Lewin* (f)."

In the case of *In re Grassi* (g) Buckley J. said, with reference to a will made out of the United Kingdom by a British subject domiciled in England in a form valid by the law of the place of making, that the statute does not say that the will shall be valid for all purposes, but says in effect

that the will shall be valid for the purpose of being admitted to probate, and will there take its place and be effectual for such purposes following on probate as the law of England allows.

and, with reference to a will made in Ontario in Ontario form by a British subject domiciled in New Jersey, Boyd C. said in *Re Dartnell* (h):

The present will, though it must be held conclusively as one duly executed and free from any defect of form, may still be open to attack, either because the testatrix was, according to the law of

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(c) (1857), 10 Moo. P.C. 306: see full statement and discussion of this case in chapter 7, § 6(2) (b).

(d) (1875), 1 Ch. D. 257, at p. 264.

(e) (1916), 37 O.L.R. 483, at p. 485.

(f) (1843), 3 Curt. 435.

(g) [1905] 1 Ch. 584, at p. 592.

(h) (1916), 37 O.L.R. 483, at p. 486.

the domicile, incapable of making a will, or because the will is materially invalidated or inoperative as containing provisions contravening the law of the domicile.

The *Dartnell* case was decided under the Ontario statute corresponding with s. 2 of the original statute, and the *Grassi* case was decided under s. 1. The result is that these two sections relate only to the formalities of making of a will (*i*), and do not validate a will if it is intrinsically invalid under the *lex rei sitae* as regards interests in land or the *lex domicilii* as regards interests in movables or intangibles.

In the *Grassi* case the subject matter was a leasehold estate in land situated in England, and it was held that the will, though formally valid under the statute, was nevertheless intrinsically invalid to the extent that it infringed the rule against accumulations or perpetuities of the *lex rei sitae*. This strange result followed from the fact that ss. 1 and 2 of the statute refer to "personal estate" instead of "movables" — "a mistake which would have been avoided by any beginner in the subject" (*g*). Some of the incongruous features of the law caused by the use of the expression "personal estate" in Lord Kingsdown's Act are described in other chapters (*k*).

Section 3 of Lord Kingsdown's Act is strikingly different from ss. 1 and 2 in that it is not expressly made applicable to "personal estate," and is not expressly limited to the will of a "British subject," and omits the expressions used in ss. 1 and 2 which lead to the conclusion that those sections are limited to questions of formal validity. Some of the problems arising under s. 3 are discussed, in connection with questions of the construction of a will, in another chapter (*l*).

In Canada the complications caused in the conflict of laws by Lord Kingsdown's Act are rendered more complicated still by the diversity of the legislation of the different provinces. In British Columbia only s. 1 of the statute has been adopted. In Alberta, New Brunswick and Ontario ss. 1, 2 and 3 have been adopted. The statute does not appear to be in force in Prince Edward Island. In Nova Scotia there is no provision corresponding with s. 2, and s. 1 has been adopted with two modifications, namely, it is not limited to wills of British sub-

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(i) The statute is discussed, as regards formal validity of a will, in chapter 22, § 2(3).

(j) Morris, *Cases on Private International Law* (1939) 308.

(k) See chapter 22, § 2(3), and chapters 21, 24, 25 and 26.

(l) See chapter 22, § 2(6).

jects and the clause relating to the law of the domicile of origin is not limited to a domicile within the British dominions.

Saskatchewan (in 1931) and Manitoba (in 1936) adopted a uniform Wills Act prepared by the Conference of Commissioners on Uniformity of Legislation in Canada, including as "Part II" under the heading "Conflict of Laws," a revised version of Lord Kingsdown's Act, limiting its permissive provisions to wills of movables and thus avoiding some of the incongruous features of the original statute (*m*).

This revised version of Lord Kingsdown's Act is as follows:

*Part II, Conflict of Laws*

34. (1) In this Part,

(a) Immovable property includes real property and a leasehold or other interest in land;

(b) Movable property includes personal property other than a leasehold or other interest in land.

(2) The manner of making, the validity and the effect of a will, so far as it relates to immovable property, shall be governed by the law of the place where the property is situate.

(3) Subject to the provisions of this Part, the manner of making, the validity and the effect of a will, so far as it relates to movable property, shall be governed by the law of the place where the testator was domiciled at the time of his death.

35. (1) A will made within the province, whatever was the domicile of the testator at the time of the making of the will or at the time of his death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate, if it is made in accordance with the provisions of Part I, or if it is made in accordance with the law in force at the time of the making thereof:

(a) of the place where the testator was domiciled when the will was made; or

(b) of the place where the testator had his domicile of origin.

(2) A will made outside the province, whatever was the domicile of the testator at the time of the making of the will or at the time of his death, shall, so far as it relates to movable property, be held to be well made and be admissible to probate, if it is made in accordance with the provisions of Part I, or if it is made in accordance with the law in force at the time of the making thereof:

(a) of the place where the testator was domiciled when the will was made; or

(b) of the place where the will was made; or

(c) of the place where the testator had his domicile of origin.

36. No will shall be held to be revoked or to have become invalid nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.

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(*m*) Conference Proceedings (1929) 46, 47; Canadian Bar Association Year Book (1929) 332, 333.

## § 2. A Redraft of Lord Kingsdown's Act\*

In view of the fact that Morris has in his instructive article on the Choice of Law Clause in Statutes (*n*) given wide publicity to the revised version of Lord Kingsdown's Act as adopted by the Commissioners on Uniformity of Legislation in Canada, and reprinted above, and has recommended the enactment of legislation in the United Kingdom "along the lines suggested" by the Conference, I venture to make some further observations. I was primarily responsible for the drafting of this revised version and therefore I can with the better grace now propose its further revision. One of the objects of the original revision was not only to rectify the error of Parliament in its reference to "personal estate" instead of movables, but also to restate the provisions of Lord Kingsdown's Act, in a statute which should itself state the general rules of the conflict of laws relating to the formal and intrinsic validity of wills. It is, however, obvious that these general rules are not adequately or accurately stated in the revised version of the Conference, and the following new version is therefore submitted. It may at least serve as a useful draft for further consideration. The new version might be enacted either as Part II of an existing Wills Act or as a separate statute, with suitable changes in heading and section numbers as the circumstances may require.

The terms "movable property" and "immovable property" which occur in the Conference version are inconsistent with the distinction between things on the one hand and the property or an interest in things on the other hand, on which I have elsewhere (*o*) laid some stress as being essential to an exact statement of conflict rules. Things may be movable or immovable, but the property or an interest in a thing is an intangible concept that cannot itself be described as movable or immovable. If the thing itself in which a person has the property or an interest is intangible, neither thing nor property or interest can be accurately described as movable or immovable, but conventionally an intangible thing is classified as movable in the conflict of laws and therefore in the new version the definition of "interest in movables" includes an interest in an intangible thing.

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(\*) This § 2 reproduces a note published (1946), 62 Law Quarterly Review 328.

(*n*) (1946), 62 L.Q. Rev. 170, at p. 185.

(*o*) See chapter 20, § 1, and chapter 21, § 1.

*Part II. Conflict of Laws [or An Act to Amend  
the Wills Act].*

1. In this Part [Act]

(a) An interest in land includes a leasehold estate as well as a freehold estate in land, and any other estate or interest in land whether the estate or interest is real property or is personal property.

(b) An interest in movables includes an interest in any tangible or intangible thing other than land, and includes personal property other than an estate or interest in land.

2. Subject to the other provisions of this Part [Act], the manner and formalities of making of a will, and the intrinsic validity and effect of a will, so far as it relates to an interest in land, shall be governed by the law of the place where the land is situated.

3. Subject to the other provisions of this Part [Act] the manner and formalities of making of a will, and the intrinsic validity and effect of a will, so far as it relates to an interest in movables, shall be governed by the law of the place where the testator was domiciled at the time of his death.

4. As regards the manner and formalities of making of a will, so far as it relates to an interest in movables, a will made within the province shall be valid and admissible to probate if it is made in accordance with the law in force at the time of the making thereof

(a) of the province under Part I [The Wills Act],

(b) of the place where the testator was domiciled when the will was made, or

(c) of the place where the testator had his domicile of origin.

5. As regards the manner and formalities of making of a will, so far as it relates to an interest in movables, a will made outside the province shall be valid and admissible to probate if it is made in accordance with the law in force at the time of the making thereof

(a) of the place where the will was made,

(b) of the place where the testator was domiciled when the will was made, or

(c) of the place where the testator had his domicile of origin.

6. A will shall not be revoked or become invalid and its construction shall not be altered by reason only of any change of domicile of the testator after the making of the will.

7. Nothing herein contained shall be construed so as to preclude resort to the law of the place where the testator was domiciled at the time of the making of a will in aid of the construction of a will relating to either an interest in land or an interest in movables.

8. Nothing herein contained shall be construed so as to preclude the application of the law of the place where land is situated, instead of the law of the domicile of the deceased owner, as regards succession on intestacy or under a will to a thing which in itself is movable because it is not physically attached to or incorporated in the land, but which is so closely connected with the use of the land that succession to it should be governed by the same law as governs succession to the land.

9. Sections 1 to 8 shall apply only to the wills of persons who die after the coming into force of those sections.

*Supplementary Comments*

Section 6 is a slightly revised version of s. 3 of Lord Kingsdown's Act. Opinions differ widely as to the meaning of the latter section (*p*), and the question whether it should be substantially revised, or limited in its application, will require further consideration.

Sections 7 and 8 are, it is submitted, essential so as to modify the absolute terms of ss. 2 and 3. Specifically s. 8 is intended to cover the keys of a house, the title deeds of land, the stones of a dry wall, etc., all of which would otherwise fall within s. 3. Obviously the statute should not require a court to apply the law of the domicile of the deceased owner. In other words it is desirable that in the case of these movable things there should be a special conflict rule making applicable the law of the situs of the land (*q*).

In effect ss. 4 and 5 allow the same alternatives for a will made within the province as for a will made outside the province, and if clause (a) of s. 4 were changed to read "(a) the law of the place where the will was made", the two sections might be amalgamated in one section.

### § 3. Postscript\*

The decision of Bennett J. in the case of *In re Priest, Belfield v. Duncan* (*r*) is the subject of adverse comment by Kahn-Freund (*s*), who says that "from a practical point of view the decision is as important as it is deplorable." The will of a person domiciled in England was made in Scotland "on a printed form prepared for use in accordance with the law of Scotland, and save for the printed part and the attestation was wholly in the testator's handwriting." It is stated in the report that the will related only to "personal property," which I understand to mean that no interest in land was in question, because it is also stated in the report that by the law of Scotland a holograph will disposing of an estate consisting only of "personal property" does not require attestation, and in Scottish law

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(*p*) See chapter 22, § 2(6).

(*q*) See chapter 21, § 2, notes (*p*) and (*q*).

\*This postscript reproduces a comment published (1945), 23 Canadian Bar Review 516-519.

(*r*) [1944] Ch. 58.

(*s*) (1944), 7 Modern L. Rev. 238.

the expression "personal property" is inappropriate and, as used in this connection, must bear a narrower meaning than it does in English law (*t*), and may be assumed to mean "movables."

If the want of exactness of the report in these respects is disregarded, it may apparently be assumed that the will in question, if it had been intended by the testator to be a Scottish holograph will, would have been held to be formally valid in England, because it was made in accordance with the law of the place of making under s. 2 of Lord Kingsdown's Act (The Wills Act, 1861). It was held by Bennett J., however, that the will was not validated by Lord Kingsdown's Act, because the testator intended to make a will in English form (that is, in accordance with the law of his domicile), and partially failed in that, because one of the witnesses was the (second) husband of the testator's daughter-in-law to whom the testator gave one-half of his estate, and the gift to her was therefore void by English law. The learned judge held that what was intended to be an English will could not be regarded as valid in England merely because by accident or inadvertence, so to speak, it happened to comply with Scottish law (the law of the place of making), which does not require any witnesses to a holograph will.

It is submitted that there is no justification for making the formal validity of a will depend on the intention of the testator to use the form prescribed by the law of a particular country. If he in fact uses the form prescribed by the law of the situs as regards interests in land, or the form prescribed by the law of his last domicile, as regards interests in movables, it would seem to be a novel and undesirable doctrine that he must also have intended in each case to comply with the proper law. As regards Lord Kingsdown's Act, there is nothing in the language of the statute to justify the view that the testator must have deliberately selected the law of a particular country and then complied with it. The object of the statute was to avoid having wills of "personal estate" (*u*) declared invalid, in point of form, in cases in which under the old law a testator had made a mistake in using the form prescribed by one law when

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(*t*) As to "personal property" in Lord Kingsdown's Act, see especially chapter 25.

(*u*) The mistake of the Parliament of the United Kingdom in 1861 in saying "personal estate" when it should have said, and probably meant, "movables," is irrelevant to the present comment.

he should have used the form prescribed by another law. The statute accordingly validated wills made in accordance with the forms prescribed by any one of several laws, including the law of the place of making, and it is submitted that the fact that compliance with one of these laws is accidental or inadvertent is not sufficient reason for excluding the will from the beneficial operation of the statute. If a will admittedly expresses the latest intention of the testator and is not intrinsically invalid, it should not be held to be invalid in form by a strict construction of the statute. The statute was, rightly it is submitted, construed with great liberality in the case of *In re Lacroix* (*v*), when a will and codicil made in France in English form, in accordance with the conflict rules of the law of the place of making, and a holograph codicil made in France, in accordance with the domestic rules of the law of the place of making, were all admitted to probate in England. Again, in *Re Howard* (*w*), Orde J. supposes, by way of example, that a person domiciled in Quebec makes a notarial will in Quebec, which happens to comply with the Ontario Wills Act because it is made by the testator in the presence of two witnesses and is attested by them. It is assumed by the learned judge, rightly it is submitted, that the will would be formally valid so as to affect the testator's freehold estate in land situated in Ontario, although the testator has no intention of making a will in English or Ontario form.

So far I have discussed the decision in the *Priest* case solely with regard to Bennett J.'s theory that Lord Kingsdown's Act was inapplicable because the testator's compliance with the law of the place of making (Scotland) was accidental in the sense that he did not intend to make a will in Scottish form. As regards this ground of decision I submit that the judgment is erroneous. It would appear, however, that on another ground, not clearly, or not at all, mentioned in the judgment, the result may be justified. As pointed out in a comment by Morris (*x*), the question which Bennett J. had to decide was not one of the formal validity of the will, but was one of intrinsic validity. That is to say, the question was whether the will was intrinsically invalid in part, or, in other words, whether the gift to the wife of one of the witnesses was

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(*v*) (1877), 2 P.D. 94: see chapter 9, § 5.

(*w*) (1923), 54 O.L.R. 109, at p. 115, [1924] 1 D.L.R. 1062, at p. 1067.

(*x*) J.H.C.M. (1945), 61 L.Q. Rev. 124.

void. The will had been already admitted to probate, it being formally valid by English law (the law of the domicile) without recourse to the law of Scotland (the law of the place of making) under Lord Kingsdown's Act, it having been duly attested by two competent witnesses.

If English law had provided that the husband of a legatee was an incompetent witness, the will would have been formally invalid by domestic English law, but would nevertheless, it is submitted, have been formally valid by the English conflict rule stated in Lord Kingsdown's Act. So far from providing that the husband is an incompetent witness, English law provides that "he shall be admitted as a witness," but that the gift to the wife shall be "utterly null and void" (y). If, as seems to be the reasonable view, the invalidity of the gift is intrinsic, not formal, then it follows that English law, as the law of the domicile, governs the succession to the movables, and the gift is void in England; and the result should be the same if the question arose in Scotland, although Scottish law does not contain any similar provision as to the attestation of a will by the husband of a legatee. As already mentioned Lord Kingsdown's Act, relating to formalities, is irrelevant to a question of intrinsic validity.

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(y) See, in England, the Wills Act, 1837, s. 15, re-enacted in Ontario, and now appearing in R.S.O. 1937, c. 164, s. 16.

## CHAPTER XXIV.

### MORTGAGEE'S INTEREST IN LAND AND THE LAW OF THE SITUS\*

The effect of the judgment of Greene J. in *Re Landry and Steinhoff (a)* may be stated as follows:

(1) A holograph will, valid by the law of Louisiana, where the testatrix, not a British subject, was domiciled at the time of her death, and therefore valid in Ontario as regards movables situated there, is inoperative in Ontario as regards the interest of the testatrix as mortgagee of land in Ontario, notwithstanding that by Ontario law her interest as mortgagee is classified as personal property.

(2) The executrix named in the will, having obtained probate in Louisiana, and, as to personal estate only, ancillary probate in Ontario, is not an "executor or administrator" in whom the mortgage vests under the Devolution of Estates Act, R.S.O. 1937, c. 163, s. 7, and therefore the executrix, having obtained a final order of foreclosure in Ontario, is unable to make a valid conveyance of the land to a purchaser.

It would appear that the learned judge was justified in the doubt expressed by him as to the applicability of the Devolution of Estates Act, R.S.O. 1937, c. 163, s. 7, to the will in question. This statutory provision was originally enacted in Ontario in 1910 (10 Edw. 7, c. 56, s. 8), adopting in substance the language of the [English] Conveyancing and Law of Property Act, 1881, c. 41, s. 30. The effect is to render unnecessary and inoperative any devise to the executor or administrator of the mortgagee's interest in the mortgaged land. The applicability of the section is, however, dependent upon there being an executor or administrator duly appointed in Ontario with respect to the mortgage in question. If a will, as in the case under discussion, is a will which is inoperative as regards land situated in Ontario, it would appear that, as regards that land, there is no executor or administrator in Ontario in whom

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\*This chapter reproduces a comment published in [1941] 1 Dominion Law Reports 703-707.

(a) [1941] O.R. 67, [1941] 1 D.L.R. 699.

The principle was accurately indicated by Russell J. (now Lord Russell of Killowen) in *In re Berchtold* (*d*), and may be stated as follows. The selection of the proper law governing succession on death is in English conflict of laws based, as a general rule, on the distinction between immovable and movable things and not on the distinction between real property and personal property (*e*). After the proper law has been selected on the basis of the distinction between immovables and movables, the distinction between realty and personalty may become important in the application of the proper law. That is to say, the interest in question will be distributed among the beneficiaries according to its nature as realty or personalty, if the selected domestic succession law draws the distinction between realty and personalty. Thus, if the interest in question is a leasehold estate in land, the proper law governing succession to that interest is the *lex rei sitae*, because the interest is an interest in an immovable thing, but if by the *lex rei sitae* a leasehold estate in land is characterized or classified as personalty, the distribution among the beneficiaries will be governed by the provisions of that law applicable to personalty (*f*). On the same principle, succession to a mortgagee's interest in mortgaged land is governed by the *lex rei sitae*, because the subject of the interest is land, but if the succession rules of the *lex rei sitae* are based on the distinction between realty and personalty, and if, as in Ontario, the interest of a mortgagee of land is classified as personalty, that interest will be distributed among the beneficiaries according to its nature as personalty.

Stated in general terms, the principle is that the English conflict rules relating to succession indicate the *lex rei sitae* and the *lex domicilii* as the proper laws governing succession to immovables and succession to movables respectively, and take no notice of the distinction between realty and personalty; but

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(*d*) [1923] 1 Ch. 192; cf. Lord Tomlin in *Macdonald v. Macdonald*, 1932 S.C. (H.L.) 79, at p. 84, quoted in chapter 21, § 1.

(*e*) See, e.g., *Freke v. Lord Carbery*, *supra*; *Pepin v. Bruyère*, [1902] 1 Ch. 24. The rule stated is a general one, but might of course be changed in any country: cf. chapter 21, § 1, notes (p), (q) and (r). In the United Kingdom and in many countries within the British Empire, an important exception to the general rule has been made by Lord Kingsdown's Act, cited below.

(*f*) See, e.g., *Duncan v. Lawson* (1889), 41 Ch. D. 394, at p. 398. As to the application of the same principle to land held upon trust for conversion into movables, or conversely, movables held upon trust for conversion into land, see chapter 29, commenting on *In re Cutcliffe's Will Trusts*, [1940] Ch. 565.

when on this principle a particular system of law has been selected as the proper law, the rules of that system of law must be applied, and if according to those rules succession depends on the distinction between realty and personalty, that distinction must of course be observed in ascertaining the persons entitled on the distribution of the surplus.

One exception must be made to the principle that in the selection of the proper law the distinction between immovables and movables is material, to the exclusion of the distinction between realty and personalty; and this exception would have changed the result in *Re Landry and Steinhoff* if the testatrix had been a British subject, either domiciled, as she was, in Louisiana, or domiciled in a province of Canada, such as Manitoba, in which a holograph will is a recognized form of will, and it being assumed that the will was made out of Ontario (*g*). This exception is created by "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects," 24 & 25 Vict., c. 114 (United Kingdom), commonly known as Lord Kingsdown's Act, and which, by virtue of the Short Titles Act, 1896, c. 14, may be cited as the Wills Act, 1861. This statute has been re-enacted, *mutatis mutandis*, in Ontario, and is contained in R.S.O. 1937, c. 164, s. 19, of which sub-s. 1 is quoted in the next chapter.

The incongruities introduced into English conflict of laws by reason of the fact that the British Parliament in 1861 inadvertently used the words "personal estate" when it meant to say "movables" have been frequently pointed out (*h*). The result of the error committed by the British Parliament in 1861, an error of which, as we have seen, judges and other persons are sometimes still guilty, is that whereas as a general rule the selection of the proper law governing succession is based on the distinction between immovables and movables and not on the distinction between realty and personalty, Lord Kingsdown's Act provides in effect that on the single question of the formal validity of a will made by a British subject some alternative formalities are allowed to the testator in the case of personalty as distinguished from realty.

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(*g*) Compare the situation in *Re Gauthier*, [1944] O.R. 401, [1944] 3 D.L.R. 401, which is the subject of comment in chapter 25.

(*h*) See chapter 23, where the whole statute is quoted, and the subject is discussed.

## CHAPTER XXV.

### MORTGAGEE'S INTEREST IN LAND; PERSONAL ESTATE WITHIN LORD KINGSDOWN'S ACT\*

In the case of *Re Gauthier* (a) the testatrix, a British subject, made a holograph will in the province of Quebec, where she was then domiciled. She was domiciled there also at the time of her death, but this fact is immaterial to the case. The question was whether this will, admittedly valid by the domestic law of Quebec, was valid in Ontario under s. 19(1) of the Wills Act, R.S.O. 1937, c. 164, which re-enacts s. 1 of the Wills Act, 1861 (U.K.), commonly known as Lord Kingsdown's Act (b), so as to pass the right of the testatrix, as mortgagee of land situated in Ontario, to the mortgage money.

The provision of the Ontario Wills Act in question is as follows:

19. (1) Every will made out of Ontario by a British subject, whatever may be his domicile at the time of making the same or at the time of his death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate in Ontario, if the same was made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the law then in force in that part of His Majesty's Dominions where he had his domicile of origin.

The case invites comparison with the earlier case of *Re Landry and Steinhoff* (c). The situation which arose in that case may be briefly restated. The testatrix, domiciled in Louisiana, and not being a British subject, was the mortgagee of land situated in Ontario. She made in Louisiana a holograph will, valid as to both land and movables by the domestic law of Louisiana, but not valid by the domestic law of Ontario and therefore, under Ontario conflict of laws, ineffective to pass to the sole beneficiary any interest of the testatrix in land in Ontario, although it would have been effective as regards movables sit-

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\*This chapter reproduces a comment published (1944), 22 Canadian Bar Review 713-720, and [1944] 3 Dominion Law Reports 405-412.

(a) [1944] O.R. 401, [1944] 3 D.L.R. 401.

(b) The complete text of that statute is quoted in chapter 23.

(c) [1941] O.R. 67, [1941] 1 D.L.R. 699.

uated in Ontario, if there had been any. The beneficiary, also named as executrix, obtained probate in Ontario limited to personal estate, but it was held that the will did not vest in her as executrix the mortgagee's interest in the land, and consequently she could not validly exercise the power of sale so as to convey the land to a purchaser, unless she obtained letters of administration in Ontario.

In an annotation in the Dominion Law Reports (*d*) I ventured to state, somewhat dogmatically, that the result in *Re Landry and Steinhoff* would have been different if the testatrix had been a British subject, because in that event the will would have validated in Ontario by Lord Kingsdown's Act, as subsequently adopted in Ontario. In other words, whereas succession to any interest in land, including the interest of a mortgagee (*e*), is governed in English and Ontario conflict of laws, as a general rule, by the *lex rei sitae*, this statute provides in effect, by way of exception, that if the particular interest in land is "personal estate," a will, as to that interest, is also valid if it is made abroad in accordance with the forms prescribed by any of the three laws specified in the statute. My statement was based on the hypothesis that the interest of a mortgagee in the mortgaged land is characterized as personal property, not real property.

In one essential particular the situation in *Re Gauthier* corresponded with the hypothetical situation stated by me, but differed from the actual situation, in *Re Landry and Steinhoff*. The testatrix was a British subject, and therefore her holograph will, valid by the domestic law of Quebec—the law of the place of making as well as the law of her domicile at the time of making—was, by virtue of Lord Kingsdown's Act, effective in Ontario as regards "personal estate." In another respect, however, the situation in *Re Landry and Steinhoff* differed from that in *Re Gauthier*. In the former case the mortgagee's interest in the mortgaged land was specifically in question. In the latter case only the right to the mortgage money was in question; the mortgagor in fact paid the money to the administrator who had been appointed in Ontario on the erroneous supposition that the testatrix had died intestate as regards her right to the mortgage money. Rose C. J., in a carefully

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(*d*) [1941] 1 D.L.R. 703, at p. 705: see chapter 24; cf. *Immovables in the Conflict of Laws* (1942), 20 Can. Bar Rev. at p. 125, and my *Law of Mortgages* (3rd ed. 1942) 809.

(*e*) Cf. *In re Hoyles*, [1941] 1 Ch. 179, at p. 187.

reasoned judgment, held that the right of the testatrix to the money was "personal estate" within the meaning of Lord Kingsdown's Act and therefore passed to the executrix under the holograph will. He found, however, that it was not necessary for him to decide, and therefore did not decide, whether the holograph will would have been effective to pass to the executrix all the rights of the testatrix as mortgagee. In other words, he did not decide that on the facts of *Re Landry and Steinhoff* the result would have been different if the testatrix had been a British subject.

The question thus left undecided in *Re Gauthier* is specifically whether "personal estate" in Lord Kingsdown's Act includes a mortgagee's interest in the mortgaged land, that is, a freehold estate in land conveyed to the mortgagee subject to a condition subsequent expressed in a proviso for defeasance or a proviso for reconveyance. It is clear that a leasehold estate held either absolutely or by way of mortgage is personal property, and for a long time has been so regarded at law. So in equity, except that if the estate is held upon trust for sale and investment of the proceeds in real property, then what is in fact personal property may by virtue of the equitable doctrine of conversion be treated as already converted and therefore as being real property.

Clearly, at law, a freehold estate is real property. On the death of the freeholder intestate the legal estate formerly descended to his heir, and under a general devise of real property the legal estate passed, whether the freehold estate was held absolutely or by way of mortgage. In equity the freehold estate, if held upon trust for conversion into personalty, might be treated as already converted. Apart from this possibility, which is mentioned only for the sake of completeness, equity, unlike law, differentiated between a freehold estate held absolutely and one held by way of mortgage. On the mortgagee's death his right to the mortgage money devolved upon his personal representative, and, as will be stated more fully later, the mortgage was regarded as merely security for the payment of the money. Consequently, although the legal estate in the land descended to the heir, the heir held the legal estate as trustee for the personal representative, and under a general devise of real property the beneficial interest in the mortgaged land did not pass. It may be noted in passing that a mortgage

of land does pass under a general bequest of personalty (f). The incongruity between the devolution of the right to the money upon the personal representative and the descent of the legal estate to the heir was removed in England by the Conveyancing and Law of Property Act, 1881, s. 30, adopted in substance in Ontario in 1910, and now being s. 7 of the Devolution Estates Act, R.S.O. 1937, c. 163, under which the legal estate of the mortgagee devolves upon his personal representative. In the meantime, in Ontario by the Devolution of Estates Act of 1886, and in England by the Land Transfer Act, 1897, the broader principle was adopted that real property generally, like personal property, devolves upon the personal representative, so that devolution upon the personal representative has completely ceased to be a distinguishing characteristic of personal property. These statutes, which assimilated real property and personal property as regards devolution upon the personal representative, do not of course affect the question now under discussion, namely, whether a mortgagee's freehold estate in land is personal property. The answer to this question must be found in the former law, and particular reference must be made to the definitions of "personal estate" and "real estate" contained in the Wills Acts. In England the Wills Act, 1837 (U.K.), s. 1, provides in part as follows:

In this Act, except where the nature of the provision or the context of the Act shall exclude such construction . . . . . the words "real estate" shall extend to manors, advowsons, messuages, lands, titles, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein.

In Ontario the Wills Act, R.S.O. 1937, c. 164, s. 1, provides:

(c) "Personal estate" shall include leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein.

(d) "Real estate" shall include messuages, land, rents and hereditaments, whether freehold or of any other tenure, and whether

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(f) *Re Dods* (1901), 1 O.L.R. 7.

corporeal, incorporeal or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein.

In England the Wills Act, 1861 (Lord Kingsdown's Act), contains no definition, but might be construed as a statute *in pari materia* to which the definition in the Wills Act, 1837, would be applicable. In Ontario Lord Kingsdown's Act has been incorporated in the Wills Act, which contains a definition of "personal estate." It is proposed now to examine some features of these definitions.

The only significant difference between the definitions of "personal estate" in the Wills Act, 1837, and the Ontario Wills Act respectively is that in the former statute it is provided that personal estate includes "all other property whatsoever which by law devolves upon the executor or administrator," whereas in the Ontario statute the corresponding words are "all other property, except real estate, which by law devolves upon the executor or administrator". The former wording furnishes an intelligible, and perhaps controlling, test under the old law for distinguishing personal property from real property, whereas the insertion of the words "except real estate" in the Ontario definition obviously deprives the whole clause of any value as a general test. The present Ontario wording made its appearance in the statutes of 1910, c. 57, s. 2. Presumably it was realized at that time that the English wording, which still appeared so late as R.S.O. 1897, c. 128, s. 9, had become inappropriate since 1886 in Ontario. It is submitted that what was required in the circumstances was not the insertion of the words "except real estate", but something like the following: "and all other property whatsoever which before the coming into force of the Devolution of Estates Act of 1886 devolved by law upon the executor or administrator".

An especially interesting feature of the definition of personal estate, in both the English and Ontario versions, is the phrase "leasehold estates and other chattels real". As to what might in the old common law be included in the expression "chattels real", Pollock and Maitland, *History of English Law before the Time of Edward I* (2nd ed. 1898) 116, say:

To a modern Englishman the phrase 'chattel real' suggests at once the 'leasehold interest,' and probably it suggests nothing else. But in the middle ages the phrase covers a whole group of rights, and the most prominent member of that group is, not the leasehold interest, but the seignorial right of marriage and wardship. When a wardship falls to the lord, this seems to be treated as a windfall; it is an eminently vendible right, and he who has it can bequeath it

by his will. At all events in the hands of a purchaser, the wardship soon becomes a bequeathable chattel: already in John's reign this is so. . . . . Is there any economic reason for this assimilation of a term of years to a wardship, and for the treatment of both of them as bequeathable chattels? We believe that there is, namely, the investment of capital, and by the way we will remark that the word *cattallum*, if often it must be translated by our *chattel*, must at others be rendered by our *capital*. Already in the year 1200 sums of money that we must call enormous were being invested in the purchase of wardship and marriages.

See also Holdsworth, History of English Law, vol. 3 (3rd ed. 1923) 215.

Compared with the assimilation of leasehold estates and wardships in the middle ages, the similar assimilation of leasehold estates and mortgages belongs to a later period of the law, and was the result of Chancery's treatment of mortgages, and in particular of the development of the equitable doctrine that the mortgagor has an estate in the land and is the beneficial owner, and that the mortgagee's estate is merely security for the payment of the money. In the editions of Williams on Real Property which appeared before the law of England was fundamentally changed by the Law of Property Act, 1925, there were two pages (introducing the discussion of leaseholds and mortgages) from which the following passages (23rd ed. 1920, pp. 541-542) are quoted, without the footnotes:

The principal interests of a personal nature derived from landed property are a term of years and mortgage. The origin and reason of the personal nature of a term of years in land have already attempted to be explained; and at the present day, leasehold interests in land, in which, amongst other things, all building leases are included, form a subject sufficiently important to require a separate consideration. The personal nature of a mortgage was not clearly established till long after a term of years was considered as a chattel. But it is now settled that every mortgage, whether with or without a bond or covenant for the repayment of the money, forms part of the personal estate of the lender or mortgagee. And when it is known that the larger proportion of the lands in this kingdom is at present in mortgage, a fact generally allowed, it is evident that a chapter devoted to mortgages cannot be superfluous. It may be pointed out that mortgages, as well as leaseholds, are included in personal estate as passing to the executor or administrator, without reference to the question whether they are things specifically recoverable. As will be seen further on, the estate of a mortgagee may have the quality and incidents of real estate *at law*, but will nevertheless form part of his personal estate *in equity*.

It will be observed that Williams in effect suggests the same economic basis for the assimilation of leaseholds and mortgages as Pollock and Maitland suggest for the assimilation of leaseholds and wardships, that is, that they are modes of investment of capital.

As noted by Rose C.J. in *Re Gauthier*, there has been no doubt since the judgment of Lord Nottingham in *Thornborough v. Baker* (g) in 1675 that on the death of a mortgagee the right to the mortgage money belongs to his executor or administrator, not to his heir (h). Only a few years later, in 1686 in *Canning v. Hicks* (i) and in 1699 in *Tabor v. Grover* (j), both cited by Rose C.J., not merely the mortgage money but also the "mortgage in fee," is treated in equity as personal estate; and in 1737 in *Casborne v. Scarfe* (k), Lord Hardwicke's famous and much discussed statement that the mortgagor's equity of redemption is an estate in the land concludes with the assertion that "a mortgage in fee is personal assets". In 1803 in *Attorney-General v. Vigor* (l), Lord Eldon said: "Where a person dies entitled to a mortgage interest, that is personal estate at that time." The whole passage in which this sentence occurs was quoted and applied, and the law was stated by Buckley J. in *In re Loveridge, Drayton v. Loveridge* (m), as follows:

The whole question to be determined is whether, after possession for three years by the testator followed by possession by the widow, the property is, for purposes of devolution from the testator, to be treated as realty or personalty.

Regarding this matter upon principle, it seems to me that the property is for purposes of devolution to be treated as personalty. The testator at the time of his death was entitled to the mortgage debt, which was personalty, and as security for that the land was vested in him subject to redemption. The estate in the land descended to the heir; but at the moment of the testator's death the heir was, as it appears to me, only a trustee for the legal personal representative, who was entitled to the debt and to the beneficial interest in the land in respect of the debt. After the lapse of many years the equity of redemption became barred, and the estate of the heir was no longer subject to redemption. But I see no reason why the estate of the heir, of which he was up to that time trustee for the legal personal representative, became at that date or at any time his property. Some one at the testator's death became entitled to this property. Unquestionably as regards the mortgage debt that person was the legal personal representative. The right against the land by way of security was the property of that same person, and, although at a later date the rights in respect of the land became enlarged from rights subject to redemption to rights freed from redemption, that can have no effect in discharging the legal owner of the land from his trusteeship for the owner of the debt.

(g) 3 Swans. 628.

(h) Cf. Holdsworth, *History of English Law*, vol. 6 (1924) 546.

(i) 1 Vern. 412.

(j) 2 Vern. 367.

(k) 1 Atk. 603, at p. 605.

(l) 8 Ves., 256, at p. 277.

(m) [1902] 2 Ch. 859, at pp. 862, 863.

In other words, notwithstanding that, until the law was changed by modern statutes, the legal freehold estate of the mortgagee continued to descend to his heir, it had become the settled rule in equity, long before the definition of personal estate was enacted in the Wills Act, 1837, that the beneficial interest in that estate devolved upon the executor or administrator (he being the cestui que trust under the trust imposed upon the heir in equity) and was personal estate within that definition. For this purpose the actual condition of the legal estate had become immaterial, as is illustrated by the parallel case of the legal freehold estate held upon trust for conversion into personalty. On the death of the cestui que trust his interest was treated as personalty by virtue of the equitable doctrine of conversion and for this purpose the actual condition of the legal estate was immaterial. See especially *In re Lyne's Settlement Trusts* (n): "There can be no doubt that by law this property devolves upon the executors."

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(n) [1919] 1 Ch. 80, at p. 98.

## CHAPTER XXVI.

### SUCCESSION TO MORTGAGEE'S INTEREST IN LAND\*

The case of *In re Dalrymple Estate, Hogg v. Provincial Tax Commission* (a) decided by the Court of Appeal for Saskatchewan, on appeal from Macdonald J. (b), involved primarily the question whether in the case of a person who at the time of his death, intestate, was domiciled in Saskatchewan, his interest as mortgagee of lands situated in British Columbia fell within s. 3 (2) of the Saskatchewan Succession Duty Act, 1938, as amended by 1940, c. 12, s. 2, subsequently re-enacted in R.S.S. 1940, c. 50, s. 3 (2). It is provided by s. 9 of the statute that "No duty shall be leviable . . . . (f) on real property situate outside of the province," and provision is made by s. 3 (2) for the payment of a tax by a "successor" if he "has become entitled or claims to be entitled to a beneficial interest in property passing on the death of a deceased person, who at the time of his death was domiciled in the province, and such title or claim to such title, is derived from or based upon a devolution by or under the law of the province." It was held that the intestate's interest as mortgagee developed by or under the law of British Columbia, not the law of Saskatchewan, and therefore was not covered by the taxing statute.

This question of the construction of the statute was disposed of in a simple manner by Macdonald J. who said that "a mortgage on land is an interest in an immovable and its devolution is governed by" the *lex rei sitae* (c). It is true, as pointed out in the Court of Appeal, that this depended on the law of British Columbia, and that the law of British Columbia

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\*This chapter reproduces a comment published (1941), 19 Canadian Bar Review 746-750, supplemented by an article published (1946), 24 Canadian Bar Review 4-12, under the title, The Privy Council and Mortgages in the Conflict of Laws.

(a) [1941] 3 W.W.R. 605; *sub nom. Hogg v. Provincial Tax Commission*, [1941] 4 D.L.R. 501.

(b) [1941] 2 W.W.R. 253.

(c) Citing *inter alia*, *In re Landry and Steinhoff* [1941] O.R. 67, [1941] 1 D.L.R. 699, and the comment thereon now reproduced in chapter 24.

had to be proved as a matter of fact in a Saskatchewan court. The evidence consisted of two affidavits made by members of the bar of British Columbia. Mr. Norris stated that according to the law of British Columbia mortgages on land are deemed in the sense of the law to be immovables, whereas Mr. Long stated that the "division of property into movables and immovables is no part of the law of British Columbia for the purpose of distribution of estates of a person dying intestate, but that money secured by mortgages on land in British Columbia devolves as personal property and not as real property under the said law." The apparent discrepancy between the depositions of the two witnesses is not very satisfactorily explained by the Court of Appeal, when it is suggested that Mr. Norris's affidavit relates to the nature of the property and the classification of mortgages as immovables, whereas Mr. Long's affidavit relates to the devolution of money secured by mortgage as personal property. A simpler, and, it is submitted, more accurate, explanation would be that one affidavit relates to the conflict rules, the other to the domestic rules, of the law of British Columbia, and, as one would expect, each affidavit states with substantial accuracy the rules to which it relates.

The matter may be made clearer by a more precise statement of the relevant rules. It being assumed that by the conflict rules of the forum (Saskatchewan) succession to movables is governed by the *lex domicilii* and succession to immovables by the *lex rei sitae*, the question is whether the interest of a mortgagee of land, or the right to money secured by mortgage on land, is an interest in an immovable thing. This would seem to be a more accurate statement of the question than to ask whether the property is movable or immovable. Things, at least if they are tangible, are either immovable (land) or movable, but the intangible legal concept described by the word "property" is not something of which immobility or mobility can be predicated in any real sense (*d*). Macdonald J. followed Mr. Norris's opinion and expressed it in more accurate language by saying that a mortgage on land is an interest in an immovable. The law of British Columbia having thus been selected as the proper law of succession, then it should normally follow that the domestic rules of the law of British Columbia are to be applied, and those rules make the devolution depend

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(d) See chapter 20.

upon the distinction between real property and personal property, not upon the distinction between interests in immovables and interests in movables, and therefore, as the interest of a mortgagee of land is personalty, that interest devolves in accordance with the rules appropriate to the devolution of personalty (e). In whatever way it devolves, it does so by virtue of the domestic rules of the law of British Columbia selected as the proper law according to the conflict rules of Saskatchewan, and is outside the scope of the Saskatchewan Succession Duty Act. The words quoted from s. 9 of that statute have of course no bearing on the matter, as the mortgagee's interest is not "real property."

Mackenzie J.A. has by a casual citation effected a partial resuscitation of *Harding v. Commissioner of Stamps for Queensland* (f), a decision of the Privy Council which might well have been left to repose in the limbo of better to be forgotten things. In this case the Privy Council, without adequate discussion, or indeed any discussion, of the specific point, held in effect that a mortgage, or a debt secured by mortgage, on land situated in Queensland was not subject to succession duty in Queensland, because the mortgage, being movable in character, devolved under the law of the foreign domicile of the *de cujus*. If it is borne in mind that a decision of the Privy Council occupies a relatively lowly place as an authority in an English court (g), it is obvious that this decision is of little weight in England, as compared with a decision of the English Court of Appeal. In the case of *In re Hoyles* (h) the Court of Appeal in England, without even mentioning the *Harding* case, held that a bequest of a mortgage of a freehold estate in land situated in Ontario was void in England, because it contravened the Mortmain Act, 1736, which was found to be part of the law of Ontario. In other words it was "a disposition by will of an interest in land in Ontario forbidden by the law of that province" (i). Notwithstanding the valiant and ingenious effort of Salmond J., delivering the judgment of the Supreme Court of New Zealand in *In re O'Neill* (j), to distinguish the *Harding* case from the *Hoyles* case, it

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(e) As to this difference between the selection and the application of the proper law, see chapter 22, § 2(1).

(f) [1898] A.C. 769.

(g) See chapter 10.

(h) [1911] 1 Ch. 179.

(i) S.C., [1910] 2 Ch. 333, at p. 342, Swinfen Eady J.

would appear to be generally accepted in English conflict of laws that a mortgage on land, notwithstanding that it is personalty — impure personalty — in domestic English law, confers on the mortgagee an interest in land, the succession to which is governed by the *lex rei sitae* and not by the *lex domicilii* (*k*), and it is satisfactory to learn from Mr. Norris's affidavit that he considered that the same rule prevails in British Columbia, as, it is submitted, it does in Ontario.

*A Sequel to the Foregoing (1946)*

Under the impression that it was well settled and almost obvious that a mortgagee of land has an interest in the land and that succession on death to such an interest is governed in the conflict of laws by the *lex rei sitae*, I wrote the foregoing comment on the case of *In re Dalrymple Estate*, in which the Court of Appeal for Saskatchewan, rightly as it seemed to me, held that the succession to a mortgagee's interest in the land was governed by the *lex rei sitae* (British Columbia) and not by the *lex domicilii* of the *de cujus* (Saskatchewan). My comment was directed chiefly to some modes of expression used in the judgments, and I observed, perhaps somewhat flippantly, that Mackenzie J.A. had by a casual citation effected a partial resuscitation of *Harding v. Commissioner of Stamps for Queensland* (*l*), in which the Privy Council without adequate discussion, or indeed any discussion, of the specific point, had held that a mortgage on land situated in Queensland was movable in character and devolved under the *lex domicilii* of the *de cujus* (Victoria) and not under the law of the situs of the land. It now appears from the decision of the Supreme Court of Victoria (full court) in *In re Williams, National Trustees, Executors and Agency Co. of Australasia v. Brien* (*m*) that the *Harding* case, so far from being a corpse, is very much alive and, if I may change the metaphor, constitutes a grave danger to navigation in the conflict of laws.

There were two mortgages in question in the *Williams* case, one in the usual common law form on land situated in England,

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(j) [1922] N.Z.L.R. 468.

(k) Cheshire, *Private International Law* (2nd ed. 1938) 409, 410, 411, 547, citing *In re Hoyles*, but not mentioning the *Harding* case; Dicey, *Conflict of Laws*, rule 150; Westlake, *Private International Law*, § 160. See also chapters 24 and 25.

(l) [1898] A.C. 769.

(m) [1945] Vict. L.R. 213.

the mortgage deed being held there, and the other in statutory form under the Torrens titles or land titles system, on land situated in New South Wales, one duplicate original being filed in the land registry there and the other duplicate original being held also in New South Wales. Matthew Williams was entitled in remainder to these two mortgages and on his death intestate, and domiciled in Victoria, the question arose whether they devolved as movables in accordance with the law of Victoria or as immovables in accordance with the laws of England and New South Wales respectively. It was held that they were movables and that the succession was governed by the law of the domicile.

The conclusion reached in the *Williams* case is, it is submitted, both contrary to principle and practically undesirable and therefore it seems worth while to discuss the matter further from both points of view.

Few things are more firmly settled in the conflict of laws than the rule that succession to land (immovables) is governed by the *lex rei sitae*. Like the corresponding rule that the conveyance of land *inter vivos* is governed by the *lex rei sitae*, it is based upon principles of obvious social convenience, it being practically inevitable that a court in one country, in so far as it is concerned at all with the title to land situated in another country, shall regard as conclusive whatever a court of the situs has decided or would decide with regard to the title (*n*).

That so important an interest in land as that of a mortgagee should form an exception to the general rule, as held in the *Williams* case (*o*), would seem to be inadmissible (*p*), either in the case of a mortgage or charge under the land titles or Torrens title system, like the mortgage on land situated in New South Wales in the *Williams* case or, *a fortiori*, in the case of a common law mortgage including a grant of the land subject to a defeasance clause, like the mortgage on land situated in England in the *Williams* case. What a court in England would have to say about the matter may be safely predicted in view of the decision of the Court of Appeal in England in *In re Hoyles* (*q*) that a mortgagee of land has an interest in land, and that succession to it is governed by the *lex rei sitae*; and in

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(*n*) See chapter 22, § 2(1), and chapter 30, § 1.

(*o*) *Supra*, note (*m*).

(*p*) See chapter 21, § 2, and chapters 24 and 25.

(*q*) *Supra*, note (*h*).

New South Wales *In re Hoyles* was followed in *Re Donnelly* (r). Inasmuch as the matter is one that must ultimately be decided by the courts of the situs, it is all the more remarkable that a court in Victoria should in the *Williams* case reach a different conclusion.

Not only is the conclusion wrong in principle, but it is also economically unreal, because it involves an artificial severance between the mortgage instrument and the interest in the land thereby conferred on the mortgagee and the characterization of the mortgage debt as the principal to which the security is merely accessory. Clearly, as stated by Lord Watson in *Walsh v. The Queen* (s), the mortgagee's interest in the land is an asset in the country in which the land is situated and, though "the personal obligation to pay may not be an asset" in that country, the "market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt with as securities". There may of course be cases in which the personal obligation is taxable in one country and the interest in the land is taxable in another, provided that the legislatures of the two countries are not limited in their powers so as to be subject to a common requirement of a single situs for the personal obligation and the interest in the land. Thus, it was possible for the Privy Council to say in the *Walsh* case that the mortgagee's interest was taxable in Queensland, where the land was situated, though the mortgage debt might also be taxable elsewhere, or to say in *Payne v. The King* (t) that a debt secured by a mortgage in statutory form on land in New South Wales was a simple contract debt in Victoria, where both creditor and debtor resided and were domiciled, and was an asset in Victoria, subject to probate duty there, notwithstanding that it might be also subject to duty in New South Wales, as being a specialty debt situated there.

In the *Harding* case (u) the Privy Council had to consider whether succession duty was payable under a statute of Queensland in respect of two debts secured by mortgages on land, stock and goods in Queensland, the creditor being domiciled in Victoria at the time of his death. The Privy Council construed

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(r) (1927), 28 S.R. (N.S.W.) 34.

(s) [1894] A.C. 144, at p. 148.

(t) [1902] A.C. 552.

(u) *Supra*, note (l).

the particular statute in question as being analogous to the British statutes respecting legacy or succession duties and therefore as being limited to movables belonging to a person who at the time of his death was domiciled in Queensland, and held the statute to be inapplicable to movables devolving under the law of a foreign domicile. The Privy Council said, however, that "it is clear that the assets now in question have locality in Queensland" and that they would have been subject to duty under a statute that purported to impose a tax on "property within Queensland" without regard to the domicile of the deceased. It is of course undeniable that the Privy Council described the assets in question as movables, but its attention was concentrated on the single question of the construction of the taxing statute and it is far-fetched to regard its judgment as a binding authority that in the conflict of laws succession to a mortgage debt is governed by the *lex domicilii* and not by the *lex rei sitae*.

If the question is one of succession on the mortgagee's death, it would obviously be impracticable that the succession to the personal obligation and the succession to the interest in the land should be governed by the laws of two different countries. As regards the selection of the proper law governing succession on death in the conflict of laws it is submitted that it is immaterial that in English domestic law a mortgagee's interest in land is, or was, personal property (*v*), or that under the former English domestic law the mortgage debt and the mortgagee's interest in the land devolved in different ways, or that for some taxation purposes the debt and the security are severable, or even that for some purposes the security is regarded as accessory to the debt. The error of which the Supreme Court of Victoria was guilty in the *Williams* case was, it is respectfully submitted, to regard itself as being bound, on a question of succession on death, by inferences drawn from expressions used by the Privy Council when it was considering other questions, especially questions of taxation, turning so often on the wording of particular taxing statutes. As pointed out by Duff J. (afterwards C.J.C.) in *Royal Trust Co. v. Provincial Secretary-Treasurer of New Brunswick* (*w*), although from the legal point of view the personal obligation is for many purposes regarded as distinct

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(*v*) Except of course as to a question of formal validity of a will under Lord Kingsdown's Act: see chapters 23, 24 and 25.

(*w*) [1925] S.C.R. 94, [1925] 2 D.L.R. 49.

from the charge on the land, the asset, from the economic or business point of view, is of course the security in its entirety, the personal obligation plus the charge; the mortgage does, unquestionably, create an interest in the land in the country where the land is situated and is "as much an asset [there] as the real estate which it affects" (x). Duff J. added: "For the purpose of applying the rules of private international law as recognized under the law of England, such a security is an 'immovable' " (y). This learned judge saw no inconsistency between holding that for taxation purposes a mortgage on land may be regarded as a thing distinct from the interest in the land (z) and holding that for succession purposes "the security in its entirety" is immovable in character, so as to be governed by the law of the situs of the land.

In view of the limitation imposed on the legislative power of the provincial legislatures in Canada by the words "direct taxation within the province in order to the raising of a revenue for provincial purposes" in clause 2 of s. 92 of the British North America Act, 1867, "the same property [cannot be] subject to taxation identical in character in more than one province" (a), but a provincial legislature may impose direct taxation upon either a person within the province or a thing within the province (b) and consequently there may *in effect* be double taxation if one province taxes a person within the province in respect of a thing situated in another province and the other province taxes the thing. On the other hand, if the question is simply one of succession on death, a thing must in its devolution be subject to a single law, that is, as a general rule, the law of the domicile as regards movables and intangibles and the law of the situs as regards interests in land. In the case of a mortgage on land it would seem to be obvious that that single law ought to be the law of the situs of the

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(x) Quoting these words from the judgment of Lord Watson in *Henty v. The Queen*, [1896] A.C. 567, at p. 574.

(y) Citing *In re Hoyles*, [1911] 1 Ch. 179.

(z) With respect, I do not think that on this point he satisfactorily distinguished *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, in which the Privy Council at least reached a conclusion which was satisfactory in the sense that the mortgage was held to be situated in the province in which the mortgaged land was situated.

(a) Cf. Anglin J. in *Smith v. Provincial Treasurer for Nova Scotia* (1919), 58 Can. S.C.R. 570, at p. 590, 47 D.L.R. 108, at p. 121.

(b) Cf. Laskin, *Taxation and Situs: Company Shares* (1941), 19 Can. Bar Rev. 617, at p. 618.

land, as was held in *In re Hoyles*, and that any cases in which, for purposes of taxation or for purposes other than succession, the mortgage instrument is said to be a movable, severable from the mortgagee's interest and capable of having a separate situs, must be disregarded.

In Canada on various occasions *In re Hoyles*, or the principle for which it stands, has been followed or adopted in succession cases (c) without regard to implications to be drawn from the language of the Privy Council in taxation cases. Now, however, in the *Williams* case, the Supreme Court of Victoria has examined the language used by the Privy Council in various taxation cases, including the *Harding* case already discussed and another Australian appeal, *Commissioner of Stamps v. Hope* (d), and the Canadian appeals in *Lambe v. Manuel* (e) and *Toronto General Trusts Corporation v. The King* (f), and of course has there found express or implied statements in favour of the view that a mortgage on land is movable in character; and has come to the conclusion that it is bound in a succession case by these statements contained in taxation cases.

The result, if there is no appeal from this decision, or if it is affirmed on appeal by the High Court of Australia, would be a deplorable discrepancy between the conflict rules of Victoria (or possibly of all states of Australia) and the conflict rules prevailing in England and in the common law provinces of Canada on the subject of succession on death.

The Privy Council has admittedly had a difficult task in taxation cases and few persons would be so rash as to suggest that it has always succeeded in steering a clear course through the great variety of taxing statutes, complicated frequently by questions of legislative power. This much seems, however, to be clear, that in its concentration on taxation questions it has been far from satisfactory in its pronouncements on questions of the conflict of laws incidentally arising in taxation cases and in its use in taxation cases of language that expressly or im-

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(c) *Henderson v. Bank of Hamilton* (1894), 23 Can. S.C.R. 716, at p. 721, Strong C.J.; *Re Burke* (1927), 22 Sask. L.R. 142, [1928] 1 D.L.R. 318, [1927] 3 W.W.R. 718; *In re Dalrymple Estate*, *supra*, note (a), at the beginning of the present chapter; *Re Gauthier*, [1941] O.R. 401, [1944] 3 D.L.R. 401, the subject of comment in chapter 25.

(d) [1891] A.C. 476.

(e) [1903] A.C. 68.

(f) [1919] A.C. 679.

pliedly seems to state principles of the conflict of laws, without adequate consideration of those principles.

Even when it purports to state principles in cases involving primarily or solely questions of the conflict of laws, the Privy Council, as it is respectfully submitted, is even less satisfactory than it is in its *obiter dicta* in taxation cases on the subject of the conflict of laws. To say that the Privy Council's statements in conflict of laws cases are "less satisfactory" is indeed a serious understatement of the harm done by that tribunal. In taxation cases, the casual statements made by the Privy Council with regard to the conflict of laws may be disregarded with comparative ease, but its statements made in conflict of laws cases are not so easily disregarded in subsequent conflict of laws cases. It is therefore all the more important that its *obiter dicta* should be distinguished from its decisions and that the former should not be regarded as sacrosanct even in cases in which its decisions are binding.

There are two outstanding defects in the Privy Council's treatment of conflict problems (*g*). In the first place, a decision of the Privy Council is stated by a single member of the Board and whatever he says in the reasons for judgment must theoretically be accepted as embodying the reasons for judgment of the Board, although practically one may suspect that there may have been dissenting opinions and be reasonably certain that if each member of the Board had been at liberty to state his reasons for judgment, his reasons would not have been identical with those stated in the official version. The net result is that the reasons for judgment as published are apt to be of a categorical and jejune character, containing general propositions unsupported by an adequate course of reasoning and representing presumably the maximum of reasoning for which the support of a majority of the Board can be secured, a sort of common denominator from which have been eliminated all the delicately shaded differences of judicial opinion which appear, for example, in judgments of the House of Lords. It happens that in the conflict of laws, which is still in the formative stage, the cross-currents of judicial opinion may be extremely valuable and the scientific development of the subject is impeded and prejudiced by some of the judgments delivered by the Privy Council. Another defect of

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(*g*) These defects have already been more fully discussed by me in chapters 10 and 16.

judgments of the Privy Council in conflict of laws cases consists in what may be called a confusion of fora. The Privy Council is sometimes inclined to regard itself as an English court, because it sits in England, and to decide cases from an English point of view, whereas in each case it is the supreme appellate tribunal for some country outside of England and is obliged to administer the law of the forum, including the conflict rules of that law, the forum not being England but being the country from which the appeal comes (*h*).

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(*h*) Cf. Cook, Logical and Legal Bases of the Conflict of Laws (1942), 458, 459.

## CHAPTER XXVII.

### CONVEYANCE OF LAND BY A FOREIGN EXECUTOR\*

The decision of Hogg J. in *Re National Trust Co. and Mendelson* (a) would seem to be so questionable on principle and authority as to deserve some special comment. The general principle appears to be established that no person is entitled to recognition as personal representative of a deceased person merely by virtue of a foreign grant of probate or letters of administration, not "sealed" (or "resealed") within the country of the forum, so as to enable him to deal with assets which are situated within the country and are therefore properly the subject of administration there (b).

Dicey, commenting on his rule 129 (c), notes "the curious departure from the rule in Ontario: *In re Green and Platt*" (d). In the case just cited, Middleton J. (afterwards J.A.) held that executors who had obtained probate in Scotland, and had registered the will in Ontario but had neither obtained probate in Ontario nor caused the foreign probate to be resealed there, were capable of executing a valid discharge of a mortgage of land in Ontario. In the case now under discussion Hogg J. has followed the decision of Middleton J. in the earlier case, and held that in similar circumstances an executor is capable of conveying real property in Ontario, without referring to the observations of Orde J. (afterwards J.A.) in the intervening case of *Re McKay* (e). In the last mentioned case, after the

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\*This chapter reproduces a comment published (1942), 20 Canadian Bar Review 256-259.

(a) [1941] O.W.N. 435, [1942] 1 D.L.R. 438.

(b) The general principle is stated in Dicey, Conflict of Laws, rule 129 and comment; Cheshire, Private International Law (2nd ed. 1938) 500-512. Both authors note the rule hereinafter mentioned that an executor derives his title from the will, not from the grant of probate, but this rule obviously has no bearing on the principle that an executor is not entitled to recognition merely by virtue of a foreign grant. See also Williams, Executors and Administrators (12th ed. 1930), vol. 1, p. 233 ff.; cf. at pp. 187 ff.: "What the Executor may do before Probate."

(c) Conflict of Laws (5th ed. 1932) 510, note (g).

(d) (1913), 29 O.L.R. 103, 13 D.L.R. 547.

(e) (1920), 18 O.W.N. 101.

death of a woman who was entitled, as *cestui que trust*, to money secured by mortgage of land in Ontario, the executor of her will obtained probate in Ontario, and then, after his death, the executors of his will obtained probate in Ohio, but not in Ontario. Orde J. held that the Ohio executors had no status in Ontario and were not entitled to receive the money or give a discharge of the mortgage, without obtaining probate in Ontario, even assuming that the executor of the deceased mortgagee disclaimed any interest and consented to the payment of the money to the Ohio executors of the executor of the *cestui que trust*.

The Registry Act, R.S.O. 1937, c. 170, s. 56(1) (a), provides for the registration of a will without probate, and s. 56(1) (b) provides for the registration of a foreign probate, but there does not appear to be any provision in the statute that a will or probate so registered shall be effective to enable the executor to discharge a mortgage of land in Ontario or to convey land in Ontario without having obtained probate in Ontario, contrary to the general principle of the conflict of laws already mentioned. If it is a Quebec notarial will, then under s. 43 the original instrument is sufficiently proved for the purpose of registration by the production of a notarial copy, but nothing is said as to the effect of registration except that the copy when registered is to be treated for all purposes as if it were the original instrument. Again, under s. 79 a will registered within twelve months after the death of the testator is to be as valid and effectual against subsequent purchasers and mortgagees as if it had been registered immediately after the testator's death. These provisions seem to be irrelevant to the question whether a foreign executor is capable of dealing with land in Ontario without obtaining probate in Ontario. It may be that a devisee takes under a will registered under s. 56(1) (a) of the Registry Act, although the will has not been admitted to probate (*f*), but it is submitted that it does not follow that an executor has power to convey real property without obtaining probate of the will. As regards the powers of sale conferred on a personal representative by s. 20 of the Devolution of Estates Act, R.S.O. 1937, c. 163, it is provided by sub-s. 7 that "an executor shall not exercise the powers conferred by this section until he has obtained probate of the

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(*f*) *Re Hollway and Adams* (1926), 58 O.L.R. 507, [1926] 2 D.L.R. 960; but *cf.* under the Land Titles Act, *Re Gund* (1923), 53 O.L.R. 371; *Magee on Land Titles* (1940) 81.

will unless with the approval of the Supreme Court or a judge thereof."

The chief ground stated by Middleton J.A. in support of his decision in *In re Green and Flatt* is that an executor derives his title from the will, the probate being merely evidentiary, and that before probate he is clothed with full title. This, it may be respectfully suggested, is too wide a statement of the executor's powers before probate. It is true that an executor before obtaining probate may do almost all the acts which are incident to his office (*g*), but in some circumstances it may become necessary for him to produce the probate. He may apparently commence an action without probate, but must produce the probate in order to obtain judgment, and, as has been already pointed out, under s. 20 of the Devolution of Estates Act he must either obtain probate of the will or obtain the approval of the court before exercising the powers conferred by that section. Furthermore, it is provided by the Surrogate Courts Act, R.S.O. 1937, c. 106, s. 50, sub-s. 3, that where an executor was at the time of the death of the testator resident out of Ontario, the court may in special circumstances appoint some other person to be the administrator.

As was stated by Phillimore L.J. in *Hewson v. Shelley* (*h*):

It is said . . . that the property of a deceased person vests in the executor immediately upon the death and by the mere effect of the will. In some senses this is true. It is true that an executor can properly act at once, that he can collect his testator's goods, receive and give discharge for debts due, and alien the goods including chattels real in due course of administration, subject always to the condition that he will some time or another satisfy the court that has jurisdiction over the subject-matter that there is a will and that he is the executor. But till he has proved it or till it has been proved to the court, till it has become probatum, his title is not certain, and in that way is not complete.

In *Hewson v. Shelley* letters of administration were granted to the widow of a man who was erroneously supposed to have died intestate. On discovery of a will the executors obtained a recall of the letters of administration and a grant of probate to themselves. It was held by the Court of Appeal in England that the letters of administration were valid until recalled, and that a conveyance made by the administratrix before the recall of the letters of administration conferred a good title upon the purchaser. Phillimore L.J., with specific reference to the Land

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(*g*) Williams, *Executors and Administrators* (12th ed. 1930), vol. 1, p. 189.

(*h*) [1914] 2 Ch. 13, at p. 38.

Transfer Act, 1897 (corresponding with the Ontario Devolution of Estates Act) said (i):

It was not to be supposed that this Act would give an executor or administrator a better title to freeholds than he had to leasehold. But it is to be supposed and is, I think, the case that it gives him the same title. This being so, the Act seems to me of value in supporting the view which I have taken as to the previous state of the law. Freeholds are to vest in the personal representative from time to time. Personal representative is defined to mean executor or administrator. The words are apt for this very state of circumstances. He who for the time is clothed by the court with authority as personal representative is to have the freeholds vested in him.

If the executor's act is one which by the domestic rules of the law of a particular country he may do without obtaining probate at all, obviously it is immaterial whether or not he produces a foreign probate. On the other hand, if in the particular circumstances he must produce a probate, it is submitted that the probate produced must be a domestic probate (or a foreign probate resealed within the jurisdiction), and that the general principle stated at the beginning of this comment precludes the use for this purpose of a foreign probate not locally resealed. The foreign probate confers authority to administer only the assets situated within the territory of the country, state or province in which probate is granted, and the probate so granted would seem to be inadequate proof of the executor's authority in any other place by the law of which in the particular circumstances he must produce a probate as proof of his authority; and, it is submitted, anything to the contrary said or decided in *In re Green and Flatt* or *Re National Trust Co. and Merdelson* is so doubtful that it is desirable that the matter should be reconsidered by an appellate court.

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(i) [1914] 2 Ch. 13, at p. 46.

## CHAPTER XXVIII.

### CONVEYANCE OF LAND BY EXECUTOR UNDER REGISTERED BUT UNPROVED WILL\*

In my comment (a) on *Re National Trust Co. and Mendelson* (b) I ventured to suggest that the decision was so questionable on principle and authority that the point should be reconsidered by an appellate court. In that case, on an application under the Vendors and Purchasers Act, R.S.O. 1937, c. 168, a purchaser was compelled to accept a conveyance of land in Ontario from an executor under a Quebec notarial will which had neither been admitted to probate nor resealed in Ontario. The result was reached, it is submitted, by an unjustified extension of the alleged principle that an executor takes not under the probate, but under the will. In the case of *Re Pickles and Johnson* (c), also on an application under the Vendors and Purchasers Act, Fisher J.A. compelled a purchaser to accept a conveyance from an executor under an Ontario will not admitted to probate in Ontario or elsewhere. The decision obviously creates a serious danger, and the result was reached, it is submitted, by an unjustified construction of certain provisions of the Registry Act, R.S.O. 1937, c. 170. Reliance was placed chiefly upon the decision of Middleton J.A. in *Re Hollwey and Adams* (d), but in that case the conveyance in question was made by the devisees under a registered but unproved will, long after the expiration of three years from the testator's death, and consequently after the land had become vested in the devisees

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\*This chapter reproduces a comment published (1942), 20 Canadian Bar Review 454-459.

(a) See chapter 27.

(b) [1941] O.W.N. 435, [1942] 1 D.L.R. 438.

(c) [1942] O.R. 246, [1942] 2 D.L.R. 653. See also a further comment on this case by C. A. W[right] (1942), 20 Can. Bar Rev. 459.

(d) (1926), 58 O.L.R. 507, [1926] 2 D.L.R. 960; cf. *Re Dennis and Lindsay* (1927), 61 O.L.R. 228, [1927] 4 D.L.R. 848, in which it was held that a conveyance made, more than two years after the owner's death, by the persons beneficially entitled on intestacy, became fully effective by the vesting of the land in the grantors three years after the death under the Devolution of Estates Act. In 1927, when application was made to a court, twenty years after the death, it might safely be assumed that there was no will.

by virtue of the Devolution of Estates Act. The devisees were also executors, but this would not seem to be material in the circumstances. Owing to the lapse of time the possibility of another will being found was practically negligible, and in this sense no harm was done by the decision. On the other hand in *Re Pickles and Johnson* the unproved will was registered under the Registry Act, the land was sold by the devisee-executrix, and the purchaser was compelled to accept a conveyance from her, all within less than three months from the testator's death. The purchaser naturally objected to accepting a conveyance from a person deriving title under the unproved will in view of the possibility that a later will might be discovered and registered within the time or times allowed by s. 79 of the Registry Act. That section provides that a will "registered within twelve months after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees as if the same had been registered immediately after such death." Then follows a provision that a will registered at a still later time in special circumstances "shall be a sufficient registration within the meaning of this Act."

Fisher J.A. purported to be giving effect to "the basic principles of ss. 73 and 74" of the Registry Act, "under which a purchaser without actual notice and claiming by priority of registration, is given complete protection" — a protection which "would not be in any way extended by a grant of probate." This is somewhat alarming language in two respects. It suggests that an unproved will, which may or may not be the last will, is, if registered, just as good as a proved will, and it suggests that ss. 73 and 74 of the Registry Act have this effect. Both points will now be discussed.

Apart from the Registry Act, it would seem to be plain that a person "who for the time being is clothed by the court with authority as personal representative is to have the freehold vested in him" (e), and can give a good title to a purchaser (f). Therefore if a will is proved the executor can make a valid conveyance to a purchaser, even though the probate is subsequently recalled on the discovery of a later will. The purchaser is protected because his grantor's status is established for

(e) Per Phillimore L.J. in *Hewson v. Shelley*, [1914] 2 Ch. 13, at p. 46, quoted in chapter 27.

(f) The principle was applied in *Hewson v. Shelley* to a conveyance by an administratrix whose grant was afterwards recalled on the discovery of a will.

the time being by the grant of probate, and not because the conveyance is made by a person who is named as executor in a will which some one says or thinks is the last will. If a purchaser takes from an executor under an unproved will, he must on general principle take the risk that the will, and consequently the conveyance to him, is waste paper by reason of the discovery and probate of a later will.

But now it is suggested that, by virtue of the Registry Act, in some mysterious way an unproved will, if registered, confers on the executor therein named a power to make a conveyance which will be valid notwithstanding the discovery and admission to probate of a later will, and the registration of the probate, all within one year from the death or within the extended period mentioned in s. 79 of the Registry Act, — events which might still come to pass in the very case which is now under discussion (*g*). Obviously, this strange result can be justified only if there is some statutory provision which expressly or impliedly requires it. As a general rule, an instrument which is a nullity is not, by the fact of registration, rendered valid. For example, a conveyance in which the grantor's name is forged does not become valid by registration (*h*), and it would seem to be clear that a subsequent purchaser from the grantee under the forged conveyance would be in no better position. Is there any substantial difference between such purchaser, and a purchaser who takes a conveyance from a person who is named as executor in a will which, as it later turns out, has been revoked by a later will and is therefore of no more validity in itself than if it had never existed. It is true that if the earlier will is admitted to probate, a conveyance from the executor for the time being is valid, and the purchaser is protected even though the later will is afterwards discovered and the probate of the earlier will is recalled. This follows from the principle stated in *Hewson v. Shelley*, cited above. It is a different thing, however, to say that mere registration of the earlier, and in fact revoked, will, which has not been admitted to probate, converts this revoked will into the last will so as to protect a purchaser from the executor

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(*g*) If no later will is discovered, then after the lapse of three years from the death the land will vest in the devisee as such and the defect of the conveyance will presumably be cured, at least in the sense that the danger of the existence of an adverse claim will have reached almost the vanishing point.

(*h*) *Freehold Loan Co. v. McArthur* (1885), 5 Man. R. 207; *In re Cooper, Cooper v. Cooper*, (1882), 20 Ch. D. 611.

named therein as against a person claiming under the later, and in fact only valid, will. It is not fanciful to suppose that in the later will both executor and devisees may be changed; and the persons claiming under that will would seem to be entitled under s. 79 of the Registry Act to a period of twelve months from the death, or in special circumstances a longer period within which to register the will. In *Re Pickles and Johnson* these hypothetical, but possibly existing, persons seem to have been somewhat summarily, and, it is submitted, wrongfully deprived of their rights under the statute within less than three months after the testator's death.

It is respectfully submitted that there is no provision in the Registry Act which requires a court to say that a worthless instrument becomes by registration a good root of title in favour of a subsequent purchaser from the registered owner (*i*). Section 56 permits an unproved will to be registered, but does not say that an invalid or revoked will becomes a valid will, the last will, or "the will" of the testator. Section 79, as we have seen, creates an exception to the general principle of ss. 73 and 74, in that it allows an extended time for registration of a will without impairment of the rights of persons claiming under it as against purchasers without notice; and it would seem to be fairly plain that this provision is intended for the benefit of the persons claiming under the will "against any precipitate action either by the heir at law or those claiming under another will" (*j*), as for example, under an earlier in fact revoked will, and it would be difficult, as well as grotesque to construe the section as intended for the protection of persons acting "precipitately" under the earlier will against persons claiming under the last will.

We come finally to ss. 73 and 74. These sections are far from being artistically drawn, and their wording has given rise to some nice problems. Their general purpose would seem however, to be clear, namely, to provide that, as between persons having competing claims relating to the same land, the person who, without having actual notice of the existence of the competing claim, is the first to register the instrument under which he claims, is entitled to priority. It must be assumed

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(i) A different principle may apply under the land titles system but, generally speaking, under the registry office system an instrument is registered for what it is worth.

(j) *Re Hollwey and Adams* (1926), 58 O.L.R. 507, at p. 510 [1926] 2 D.L.R. 960, at p. 962.

that the person who is claiming priority by virtue of the prior registration has a claim of some validity in itself, and that the only question dealt with by the statute is whether his claim or some one else's claim is entitled to priority. The sections simply will not bear the construction that a person who has no valid claim can, by registering an instrument which is in effect a worthless piece of paper, without actual notice of any one else's claim, by this means render his claim valid as against a person who claims under a subsequent valid instrument or as against any other person.

As regards the predecessor of s. 73, it was said by Macaulay C.J. in *Doe dem. Spafford v. Breckenridge* (k): "The Registry Act never could have intended to set off forged deeds or conveyances by persons having no title, in preference to rightful conveyance of the true owners." The latter "cannot be fraudulent and void as to deeds not from the same party, but from strangers who had no title," and registration "of a forged deed, or a deed from a person falsely personating the owner or having no valid or legal title" is not "such a registration as can give efficacy to the deed" by virtue of priority of registration. It is true that subsequently, namely, in 1865, the Registry Act was amended by the enactment of the predecessor of the present s. 74. In the cases in which this section has been discussed (l), it has never been suggested, so far as I am aware, that its effect is to make valid, on registration, an instrument which before being registered is invalid, and it would seem that the amendment was directed solely to the question of notice, and the relation of notice to priorities. In 1865 in Upper Canada, the courts of common law were still distinct from the Court of Chancery. In equity a person took subject to any earlier instrument if he took with notice, actual or constructive, of its existence. At law there was no corresponding doctrine of notice applicable to competing claims to the legal estate. The primary purpose of the statute was a negative one, namely, to prevent a person from asserting at law, by virtue of prior registration, a claim under an instrument taken with actual notice of an earlier instrument. It also had the effect of ex-

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(k) (1851), 1 U.C.C.P. 492, at p. 505.

(l) See, e.g., *Millar v. Smith* (1873), 23 U.C.C.P. 47; cf. *Rose v. Peterkin* (1885), 13 Can. S.C.R. 677, at pp. 709, 710, Strong J., and, in the Court of Appeal for Ontario, *sub nom. Peterkin v. McFarlane* (1881), 9 O.A.R. 429, at p. 465; *Cooley v. Smith* (1877), 40 U.C.Q.B. 543, at pp. 557 ff.

cluding the equitable doctrine of constructive notice, so that in equity as well as at law, actual notice is sufficient, and constructive notice is not sufficient, to defeat a claim based upon prior registration. In 1873 the predecessor of s. 73 was also amended by the insertion of the words "without actual notice."

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THE DOCTRINE OF CONVERSION; REALTY  
OR PERSONALTY\*

The decision of Morton J. in *In re Cutcliffe's Will Trusts, Brewer v. Cutcliffe* (a) is, it is submitted, unfortunate and confusing, because the learned judge, in distinguishing *In re Berchtold* (b), seems to have misapprehended the principle which was clearly and accurately stated in that case by Russell J. (as he then was). The principle is that the selection of the proper law governing succession on death is, as a general rule, in English conflict of laws based on the distinction between immovable things (land), and movable things and not on the distinction between real property and personal property (c); but that when the proper law has been selected on the basis of the distinction between immovables and movables, the distinction between realty and personalty may become important, that is to say, the interest in question will be distributed among the beneficiaries according to its nature as realty or personalty, if the selected domestic succession law is based on the distinction between realty and personalty. Thus, if the interest in question is a leasehold estate in land, the proper law governing its succession is the *lex rei sitae*, because the property is an interest in an immovable thing, but if by the proper law a leasehold estate in land is characterized or classified as personalty, the distribution among the beneficiaries will be governed by the provisions of that law applicable to personalty (d).

Again, if the property in question is an interest in an immovable thing (land) at the material time, the law governing

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\*This chapter reproduces a comment published (1940), 18 Canadian Bar Review 568-573, to which have been added some supplementary observations.

(a) [1940] Ch. 565.

(b) *In re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

(c) See, e.g., *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461; *Pepin v. Bruyère*, [1902] 1 Ch. 24. The exception created by Lord Kingsdown's Act will be discussed later in this comment. As regards the general principle stated and amplified in the text, see especially chapter 21, § 1, notes (p), (q) and (r).

(d) See, e.g., *Duncan v. Lawson* (1889), 41 Ch. D. 394, at p. 398.

succession to it is the *lex rei sitae*, notwithstanding that by the doctrine of conversion the property is personalty and not realty. Conversely, if the property in question is an interest in a movable or an intangible thing (for example, money, bonds or shares) at the material time, the law governing succession to it is the *lex domicilii* of the *de cujus*, notwithstanding that by the doctrine of conversion the property is realty and not personalty. On the other hand, when the proper law — whether the *lex rei sitae* or the *lex domicilii* — has been selected, and by that law a distinction is made between realty and personalty, the property will be distributed according to its nature as realty or personalty, as the case may be. In other words, the English conflict rules which indicate the *lex rei sitae* and the *lex domicilii* as the proper laws governing succession to immovables and succession to movables respectively take no notice of the distinction between realty and personalty, but when a particular system of law has been selected as the proper law, the domestic rules of that system of law must be applied, and if according to those domestic rules succession depends on the distinction between realty and personalty, that distinction must of course be observed. Therefore, if the property in question is the interest of the *de cujus* as beneficiary under a trust for sale of a freehold estate in land situated in England, and still held by the trustee unsold, and the *de cujus* was domiciled in Ontario, the law of England, the *lex rei sitae*, is the proper law governing succession (*e*), and consequently the property would be distributed, by virtue of the doctrine of conversion, as personalty in accordance with the domestic law of England (*f*).

The *Cutcliffe* case presented the converse situation. The property in question consisted at the time of the death of the *de cujus* of certain debenture stock in a British company. This stock had been bought by trustees with part of the proceeds of land originally held upon trust and sold under the Settled Land Acts. The land was situated in England, the trustees were resident there, and the trust was created by an English testatrix, and in view of these circumstances it was held that

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(*e*) So held by Russell J. in *Re Berchtold*, note (b), *supra*, a case in which the land was situated in England, and the *de cujus* was domiciled in Hungary.

(*f*) By virtue of the English legislation of 1925 the importance of the distinction between realty and personalty is much diminished, but this fact is immaterial to the general principle.

the stock was situated in England. The main question was whether on the death of a beneficiary the succession to his interest in the stock should be governed by the *lex rei sitae* (the law of England) or by the *lex domicilii* (the law of Ontario). On principle the answer would seem to be obvious. The stock was of course an intangible thing, and the beneficiary's interest was an interest in an intangible thing, the succession (as in the case of succession to movables) should be governed by the *lex domicilii* of the *de cuius*, and in the application of the domestic law of Ontario it would have to be considered whether by the doctrine of conversion the property should be disposed of as if it had been actually reconverted into realty, and not on the basis of its actual nature as personalty. This was not, however, Morton J.'s conclusion. He relied upon s. 22, sub-s. 5, of the Settled Land Act, 1862, which provides '(g) that capital money arising under the statute, while uninvested or unapplied, and securities on which an investment of it is made, shall, for all purposes of disposition, transmission and devolution, be considered as land (h)'. Consequently he held that the interest of the deceased beneficiary was an interest in an immovable, and that the law of England was the law governing succession, so that the heir at law by English law was entitled to succeed and not the next of kin by Ontario law.

This conclusion, it is submitted, is based on a confusion between conflict rules and domestic rules of law. The doctrine of conversion is a characteristic doctrine of domestic English law arising from the distinction between realty and personalty, and whether it is a judge-made rule, as in the *Berchtold* case, or has been expressed in statutory form, as in the *Cutcliffe* case, in either event the doctrine can have no application to a particular situation unless it has first been decided in accordance with the conflict rules of the forum that the proper law is domestic English law or some other law that distinguishes between realty and personalty and includes the doctrine of conversion. After the proper law has been selected, (that is, as it is submitted, Ontario law, because at the material time the interest of the *de cuius* was not an interest in land), then of course the domestic rules of the selected proper law will be

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(g) In England the provision has been substantially reproduced in the Settled Land Act, 1925, s. 75, sub-s. 5; cf. note (j), *infra*.

(h) As to the meaning of "land" in this connection, see note (m), *infra*.

applicable in their entirety, but even if by those rules the property will for purposes of devolution be regarded as being converted from personalty to realty, this will not involve any reconsideration of the selection of the proper law.

It is also submitted that in the *Cutcliffe* case Morton J. was in error in thinking that his conclusion was supported by anything that was said or decided in *In re Cartwright (i)*. In this latter case certain freehold estates in land situated in England were held in trust, and the testator, as tenant for life, had sold them under the Settled Land Acts, and part of the proceeds were still retained by the trustee and invested in personal securities. The testator, having become absolutely entitled to the investments representing the sale of the freehold estates subject to certain charges, purported to dispose of them by a will made in France in French form. The testator being a British subject domiciled in England, the will, not being in the domiciliary form, was invalid in point of form unless it was a will of "personal estate" within Lord Kingsdown's Act. It was held that the will was invalid, because by virtue of the Settled Land Act, 1925, s. 75, sub-s. 5 (*j*), the investments must be treated as real property. This decision is in accordance with previous cases relating to the construction of Lord Kingsdown's Act, but it has no relevance to the point decided in the *Cutcliffe* case, in which Lord Kingsdown's Act was not in question. Lord Kingsdown's Act is an example of an unfortunate legislative error faithfully perpetuated by the courts. By this statute it was provided in effect that "as regards personal estate" a will made by a British subject outside of the United Kingdom should be valid (that is, so far as formalities are concerned) if made according to the forms required by the law either of the place of making or of the domicile of the testator at the time of making or of the domicile of origin, within the British dominions, of the testator. What was obviously intended was to give a testator, in the case of a will of movables, a choice among the forms of three different laws, in addition to any of the forms available to him under the existing conflict rule relating to wills of movables, namely, those required by the law of his domicile at the time of his death. Unfortunately, however, the British Parliament, committing an error of which judges and even extrajudicial writers

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(i) [1939] Ch. 90.

(j) See note (g), *supra*

are sometimes guilty, spoke not of wills of movables, but of wills of "personal estate"; with the result that the statute applies not only to wills of movables, but also to wills of immovables in some circumstances, but not in others (*k*).

By way of contrast with the principle stated at the beginning of this comment, that is, that the selection of the proper law governing succession is based on the distinction between immovables and movables and not on the distinction between realty and personalty, Lord Kingsdown's Act provides in effect that on the single question of the formal validity of a will made by a British subject some alternative formalities are allowed to the testator in the case of personalty as distinguished from realty. Thus, a will of a freehold estate in land held upon trust for sale and conversion into personalty, but not yet sold, is within the statute, and the testator may use either the forms of the *lex rei sitae*, because the subject matter is in fact an interest in immovables, or any of the alternatives mentioned in the statute, because by virtue of the doctrine of conversion the subject matter is personalty (*l*). Conversely, a will relating to movables held upon trust for sale and conversion into realty is outside the statute, because the subject matter is by virtue of the doctrine of conversion realty, but is in fact an interest in movables, and therefore the testator must use the forms of the law of his domicile (*m*). The inveterate conservatism of lawyers may help to explain, though it cannot justify,

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(*k*) I have elsewhere attempted to state some of the incongruities resulting from Lord Kingsdown's Act: see especially chapter 22, § 2(3), and chapter 23.

(*l*) *In re Lyne's Settlement Trusts*, [1919] 1 Ch. 80. In the case of a leasehold estate in land held upon trust, the result would be the same in the absence of a trust for conversion into realty, because the subject matter in its actual condition at the material time would be personalty and also an interest in land.

(*m*) *Cf. In re Cartwright*, note (i), *supra*. In the case of a freehold estate in land held upon trust for conversion into leasehold, Lord Kingsdown's Act would apply, and the testator may use either the forms of the *lex rei sitae* or any of the alternatives allowed by the statute; and in the case of movables held upon a similar trust the testator may use either the forms of the *lex domicilii* or any of the alternatives allowed by the statute. In the *Cartwright* case, [1939] Ch. 90, at p.104, Greene M.R. suggests that the word "land" in the Settled Land Acts (notes (g), (h) and (j), *supra*, must be construed as meaning a freehold estate if a settled freehold has been sold, and as meaning a leasehold estate if a settled leasehold has been sold, with of course a corresponding difference of result with regard to the application of Lord Kingsdown's Act.

the perpetuation of the incongruous features of a statute passed in 1861.

*Supplementary Observations (1946)*

While I adhere to the opinion expressed in the foregoing comment that the decision in the *Cutcliffe* case was erroneous, I ought to mention the fact that in a subsequent comment (*n*) the decision was approved, on the ground that "the Settled Land Act was intended not to let the accident of the sale of a portion of settled land cause the proceeds to devolve in a manner different from the rest of the land, regardless of where decedent was domiciled."

It is of course unquestionable that the Parliament of the United Kingdom could, as to interests in things situated in England, amend not only the domestic law of England with respect to succession, but also amend the conflict rules of the law of England with respect to succession. Parliament could, in the specific situation, provide that succession to things which are in fact movable or intangible should be governed by the *lex rei sitae* in partial deviation from the general rule that succession to movables and intangibles is governed by the *lex domicilii*. Whether Parliament intended to do this, that is, whether the statute should be construed as doing this, is another matter. The presumption seems to be strong that an amendment of the law of England with regard the doctrine of conversion, a peculiar feature of the domestic law of England and other Anglo-American countries, should be construed merely as an amendment of the domestic law of England, and therefore should be applicable only to a case in which on the general principles of the conflict of laws the succession is governed by the domestic law of England.

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(*n*) (1940), 54 Harv. L.Rev. 134.

## CHAPTER XXX.

### PROPERTY IN LAND AND CONTRACT OR EQUITY REGARDING LAND; JURISDICTION OF COURTS\*

- § 1. Title to or possession of land, p. 519.
- § 2. Property or interest and legal relations, p. 522.
- § 3. Contract or equity with respect to land, p. 528.
- § 4. Jurisdiction of courts, p. 534.

#### § 1. Title to and Possession of Land.

The general conflict rule that questions of the creation, acquisition, transfer and extinction of interests in land (immovable things) are governed by the *lex rei sitae*, that is, the law of the situs of the land, has been already discussed with particular reference to succession on death (*a*). The general rule applies also to transactions *inter vivos*, and it remains to discuss the scope of the rule dissociated from considerations peculiar to succession on death.

In the present chapter it is assumed that the characterization or classification of interests in things is governed by the *lex rei sitae*, including the question whether an interest claimed is an interest in land (*b*), and that it is only the distinction between movables and immovables that is material for the purpose of the selection of the proper law (*c*), and that the distinction between personal property and real property is immaterial for the purpose of the selection of the proper law (*d*);

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\*This chapter reproduces in a revised form §§ 5, 6 and 8 of an article, entitled *Immovables in the Conflict of Laws*, published (1942), 20 Canadian Bar Review 113-122, 133-140, subsequently forming part of a chapter, bearing the same title, in my *Law of Mortgages* (3rd ed. 1942) 796-806, 818-825. Section 2 of the present chapter is substantially new.

(*a*) See chapter 22, § 2. As to the basis of the general rule, see especially the first footnote to that section.

(*b*) See chapter 4, § 7, and chapter 21, § 2.

(*c*) In the case of succession on death, see chapter 22. In the case of transfer *inter vivos* even this distinction may be immaterial, because the *lex rei sitae* is the governing law both as to movables and immovables.

(*d*) As to this general rule, see especially chapter 21, § 1, notes (p), (q) and (r).

but that when the proper law has been selected, and that law draws the distinction between personalty and realty, this distinction may be material in the application of that law (*e*). It is also assumed that for a court of a country other than that of the situs the *lex rei sitae* means whatever law, whether conflict rules or domestic rules, has been or would be applied by a court of the situs (*f*). A court of the situs would of course apply whatever law is applicable under the conflict rules of the forum.

A court in one country should not and usually will not entertain proceedings which purport directly to affect the title to (the property in or an interest in) land situated in another country, and cannot give an effective judgment with regard to the title to that land or the possession of it (*g*). So far as the *forum rei sitae* is alone competent, it follows that the conflict rules of the *lex fori* (*lex rei sitae*) will be exclusively applied, and as a general rule those conflict rules will make applicable the domestic rules of the *lex rei sitae*. There may, however, be questions with respect to land which are not characterized as questions of title (property, interest) and as regards which some law other than the *lex rei sitae* is or may be the proper law, and as regards which a court in a country other than that of the situs has or may assume jurisdiction. Questions of this kind will be discussed later (*h*), and it remains to discuss the scope of the general rule stated at the beginning of the present chapter.

Dicey (*i*) says:

Rule 150.—All rights over, or in relation to, an immovable (land) are (subject to the exceptions herein mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

Westlake, having pointed out that the principle of the *lex situs*, or of the real statute, was eagerly seized on in England in its application to land, and that the principle received there its utmost development (*j*), states:

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(*e*) See chapter 22, § 2(1), footnote (k). It is less likely in the case of transfer *inter vivos* than in the case of succession that the distinction between personalty and realty will be material.

(*f*) See chapter 22, § 2(8).

(*g*) See § 4 of the present chapter, *infra*.

(*h*) See §§ 3 and 4 of the present chapter, and chapter 31, § 3.

(*i*) Conflict of Laws (5th ed. 1932). The exceptions to Dicey's rule relate to matters discussed in chapter 22, § 2(1), in §§ 3 and 4 of the present chapter, and in chapter 31, § 3.

(*j*) Private International Law (7th ed. 1925) 216.

§ 156. All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*.

As to the form of a conveyance of any interest in land, the rule is settled that the *lex rei sitae* must be complied with. The rule clearly applies to any case in which the priority or validity of the interest of a grantee or mortgagee depends on his having the legal estate, that is, the title to or property in the land, strictly speaking (*k*). Equally clearly, so far as priority or validity depends upon registration under any system of registration of instruments relating to land, the *lex rei sitae* must be complied with as regards formalities (*l*). *A fortiori*, in the case of land subject to a system of registration of titles, an instrument must in point of form comply with the *lex situs* of the land, because it must be in registrable form according to that law, and it must be registered, in order that it may be fully effective so as to pass an estate or interest in the land as against a transferee in good faith. It is true that unregistered or so-called equitable interests may be created, but persons claiming such interests must, in order to protect themselves, comply with the *lex situs* as to the registration of caveats, cautions, etc., and, generally speaking, the importance of unregistered instruments is, under the land titles system, reduced to a minimum.

Almost all the incidents which arise in connection with land are governed by the *lex rei sitae*. Thus, the liability for deterioration or waste, though it may by accident be enforceable in another country *in personam*, is to be decided and measured by the *lex rei sitae* (*m*). Restraints imposed by the *lex rei sitae* on the transfer of land are binding elsewhere, and conversely restraints imposed by the law of one country on the transfer of land are not applicable to land in another country (*n*).

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(*k*) *Adams v. Clutterbuck* (1883), 10 Q.B.D. 403; *Re Mills* (1912), 3 O.W.N. 1036, 3 D.L.R. 614; *cf.* Foote, *Private International Law* (5th ed. 1925) 250 ff.; Dicey, *Conflict of Laws* (5th ed. 1932) 586-587.

(*l*) *Cf.* *Hicks v. Powell* (1869), L.R. 4 Ch. 741; *Norton v. Florence Land and Public Works Co.* (1877), 7 Ch. D. 332. See also *Bank of Africa v. Cohen*, [1909] 2 Ch. 129, in chapter 31, § 3.

(*m*) *Cf.* Foote, *Private International Law* (5th ed. 1925) 243, citing *Batthyany v. Walford* (1886), 36 Ch. D. 269.

(*n*) *Cf.* Foote, *op. cit.*, p. 252. See also *Freke v. Lord Carbery* (1873), L.R. 16 Eq. 461 (trust for accumulation contrary to the *Thellusson Act*); *In re Hoyles, Row v. Jagg*, [1911] 1 Ch. 179, (gift of mortgage to a charitable use), cited in chapter 22, § 2(2).

Westlake (o) also states:

§ 157. Interests in land which are limited in duration, whether for terms of years, for life, or otherwise; interests in land which are limited in their nature, as legal (*ex jure Quiritium*—Gaius) or beneficial (*in bonis*—Gaius); servitudes, charges, liens, and all other dismemberments of the property in land; are immovables as well as the land itself.

If, instead of the concluding words "are immovables as well as the land itself," we read "are property in immovables within the meaning of § 156" (p), confusion between the land and the property in land will be avoided, and Westlake's meaning will be made clearer because the concluding words of § 157 will be brought into accord with their immediate context ("dismemberments of the property in land") and with § 156—the intention of the author obviously being to define in § 157 what is included in "property in immovables" in § 156.

It thus appears that the concept of property in land or an interest in land within the meaning of the general conflict rule stated at the beginning of the present chapter is a wide one, including equitable interests and other interests which are not exactly equivalent to the property in land in the strictly legal sense.

## § 2. Property or Interest and Legal Relations.

At this point we are confronted with a fundamental problem, which may be, alternatively, expressed in two ways:

(1) The concept of property or interest in land or any other thing may be so wide that it includes all legal relations (a) arising from contracts or equities with respect to land or other thing, notwithstanding that it is commonly said (b) that some of these relations may be governed by some law other than the *lex rei sitae*.

(2) The alleged concept of property or interest in land or any other thing may on analysis be found to be indistinguishable from the concept of legal relations with respect to land or other thing; and nevertheless certain conflict rules, as commonly stated, appear to be based upon the theory that these two concepts are distinguishable.

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(o) Private International Law.

(p) § 156: "All questions concerning the property in immovables ... are decided by the *lex situs*."

(a) The word "legal" being here used as including "equitable."

(b) See § 3, *infra*.

The matter deserve further elucidation, and for this purpose it seems worthwhile next to consider certain portions of the Conflict of Laws Restatement and the Property Restatement of the American Law Institute. Thus, the general conflict rule stated at the beginning of the present chapter is expressed in the Conflict of Laws Restatement in a series of rules stated in terms of "an interest in land," and making applicable the *lex rei sitae* (c).

On the other hand, under the heading "Contracts," we find the following sections:

§ 340. The law of the place of contracting determines the validity of a promise to transfer or to convey land.

§ 341. (1) The law of the place where a deed of conveyance of an interest in land is delivered determines the contractual duties of the grantor.

(2) The law of the state where the land is determines those duties of the grantor with respect to the land which are not contractual in character.

The rules stated in §§ 340 and 341(1) are substantially different from the rules as to the proper law of a contract with respect to land stated in English cases, as will appear later (d), but for the moment I am concerned only with the attempt of the Restatement to distinguish between a transaction that creates or transfers an interest in land and a transaction that merely creates a contractual or personal right with respect to the land. The concept of "interest" in land, in the Restatement, is a wide one, as explained in the following passages:

The word "interest" is used in the Restatement of this subject both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them. (Comment b on § 42).

The word "interest" is used throughout the Restatement of this subject as indicating the normally beneficial side of a legal relation, as a right, power, privilege or immunity. The word "property" is used throughout the Restatement as a synonym for interest as thus explained. It may, therefore, be used to denote a single interest, as

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(c) See, e.g., § 214 (legal effect and interpretation of words used in instrument of conveyance), § 215 (validity of conveyance), § 216 (capacity to convey), § 217 (formalities), § 218 (substantial validity), § 219 (capacity of grantee), § 220 (effect of conveyance), § 221 (nature of interest), § 222 (non-possessory interests), §§ 225-229 (mortgage on land). On the other hand, § 230 (lien on land) and § 231 (charge on land) omit any reference to "interest". Under the heading "Powers," §§ 232, 235 and 236 refer to "land," while §§ 233 and 234 refer to "interest" or "interests" in land.

(d) See § 3, *infra*.

the right under a contract for the payment of money. Normally, however, throughout the Restatement, it is used to designate a group of two or more interests with regard to a particular thing, as a piece of land, a chattel, a chose in action. The word "property" is never used to indicate a thing in regard to which the interest exists; that is, it is never used as a synonym for land or chattels. The word "thing" is used with broadest connotation, to include not only tangible but intangible things. (Introductory note to chapter 7, Property).

For further elucidation of the terms "rights, privileges, powers and immunities" we must turn to the Property Restatement.

In § 5 of the Property Restatement (e) "interest" is defined in the same way as it is defined in comment *b* on § 42 of the Conflict of Laws Restatement above quoted. The word "property," as stated in the Introductory note in chapter 1, "is used in this Restatement to denote legal relations between persons with respect to a thing." "Legal relations" are analyzed and subdivided into four types expressed by the words "right" (with its correlative "duty"), "privilege" (with its correlative "absence of right"), "power" (with its correlative "liability") and "immunity" (with its correlative "disability"), defined as follows (f):

§ 1. A right . . . is a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act.

§ A privilege . . . is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act.

§ 3. A power . . . is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

§ 4. An immunity . . . is a freedom on the part of one person against having a given legal relation altered by a given act or omission to act on the part of another person.

With particular reference to equitable interests, the Conflict of Laws Restatement contains the following sections:

§ 239. Whether a person has an equitable interest in land is determined by the law of the state where the land is.

§ 240. A court of one state cannot by its decree create an equitable interest in land in another state.

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(e) Promulgated by the American Law Institute in 1936, two years after the promulgation of the Conflict of Laws Restatement.

(f) Adopting in effect the table of jural correlatives contained in Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923) 36, as reprinted from the same author's article (1913), 23 *Yale L.J.* 16; cf. Cook, *Hohfeld's Contributions to the Science of Law* (1919), 28 *Yale L.J.* 721, reprinted as an introduction to the book cited. Instead of "absence of right," correlative of "privilege," Hohfeld said "no-right." See also Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 53 ff.

§ 241. The validity of a trust of an interest in land is determined by the law of the state where the land is.

The comments appended to § 239 include the following:

An equitable interest in land is to be distinguished from a right against the owner for a conveyance of the land by him, which may be enforced by a court of any state by ordering the owner to convey the land; but this order will have no effect upon any interest in the land if made by a court outside the state where the land is. The interests will be affected only if the owner transfers them in pursuance of the order.

Whether the beneficiary of a trust of land has an equitable interest in the land as contrasted with a merely personal claim against the trustee is determined by the law of the state where the land is.

The distinction stated in the passages just quoted between an equitable interest in land and a mere personal claim, and the parallel distinction drawn between a conveyance or mortgage of land, governed by the *lex rei sitae* (*g*), and contractual duties under a conveyance of land or a promise to convey land, which may be governed by another law (*h*), are somewhat mystifying against the background of the adoption in the Restatement of the theory that an interest in land is merely "the normally beneficial side of a legal relation, as a right, power, privilege or immunity" (*i*). The mystification is not lessened if we turn to the consideration of the controversial question as to the nature of equitable interests, bearing in mind that not only in the Restatement, but also in Westlake's rule 157 quoted in § 1 of the present chapter (*j*), equitable interests as well as legal interests are included in interests in land within the rule that questions of the creation, acquisition, transfer and extinction of interests in land are governed by the *lex rei sitae*.

It is impossible to discuss the nature of equitable interests for the present purpose without some reference to Maitland's well known thesis (*k*) that all equitable interests are *jura in*

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(*g*) See §§ 214 ff., cited in note (c), *supra*.

(*h*) See §§ 340, 341, quoted earlier in the present § 2.

(*i*) Already quoted in the present § 2 from the introductory note to chapter 7 of the Conflict of Laws Restatement.

(*j*) See notes (o) and (p) in § 1, *supra*.

(*k*) Equity and the Forms of Action (1909) 111 ff., 122 g.; Equity (2nd ed. 1936) 106 ff., 117 ff.; cf. Duff J. (afterwards C.J.C.) in *Forth v. Alliance Investment Co.* (1914), 49 Can. S.C.R. 384, at p. 390, 20 D.L.R. 356, at p. 361: "Primarily the equitable rights were rights *in personam*, but the peculiar nature and efficacy of the remedies available in the Court of Chancery for the enforcement of such rights together with the effect of the equitable doctrine of notice, in enormously widening the field over which rights *in personam* would otherwise have been enforceable, eventually led in certain cases to such rights being regarded as *jura in re* and protected as rights of

*personam*, which for some purposes are treated as if they were, and are "misleadingly like," *jura in rem* or "ownership" or "proprietary rights", but which are in truth only *jura in personam* because they are enforceable against certain persons or certain classes of persons, but not against "the world at large."

Maitland's thesis has been vigorously disputed. The view has been stated that "to speak of equitable ownership is just as accurate a use of terms as to speak of legal ownership" (l). This may be readily admitted, provided that it is understood there may nevertheless be a difference between equitable ownership and legal ownership, or between an equitable estate or interest and a legal estate or interest (m).

In some cases, as, for example, when the Court of Chancery was asserting its jurisdiction to make decrees against a person present in England with respect to land situated abroad, the court stressed the theory that it was acting *in personam* and not dealing directly with the land (n); but even in this class of cases the court's method of enforcing obedience by committal and sequestration had the result of making its decrees more truly effective *in rem* than common law judgments were. On the other hand, in other cases the same Court of Chancery developed a theory of equitable interests or estates in land and a system of priorities (o), frankly treating such interests or estates ob-

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ownership." See also Langdell, Brief Survey of Equity Jurisdiction (2nd ed. 1908) 4 ff., 251 ff. The effect of Hohfeld's analysis on Maitland's thesis will be noted later. It may be mentioned incidentally that Maitland's other thesis, that the relation between law and equity was not one of "conflict," is the subject of devastating criticism in Hohfeld, Fundamental Legal Conceptions (1923) 115 ff., especially at p. 121; cf. Cook's Introduction to Hohfeld's book, at pp. 16 ff., and Cook, review of Billson, Equity in its Relation to Common Law (1917), 27 Yale L.J. 290. A compromise view is suggested by Hanbury, Modern Equity (4th ed. 1946) 67.

(l) Scott, Nature of the Rights of the *Cestui que Trust* (1917), 17 Columbia L. Rev. 269, at p. 275; cf. Scott, Law of Trusts (1939), vol. 1, § 130, pp. 678-690; contrast Stone, Nature of the Rights of the *Cestui que Trust* (1917), 17 Columbia L. Rev. 467, at p. 500. Hanbury, Modern Equity (4th ed. 1946) 102, 103, suggests an intermediate view.

(m) Contrast Turner, Equity of Redemption (1931), chapters 2 and 3, leading to the conclusion that a mortgagor's equity of redemption is an "estate in the land," with the remarks of some reviewers of Turner: Holdsworth (1931), 47 L.Q. Rev. 428, at p. 429 ("An equitable estate in the land of a peculiar kind"); Plucknett (1932), 45 Harv. L. Rev. 1279, at pp. 1280, 1281.

(n) See § 4, *infra*.

(o) Cf. my Law of Mortgages (3rd ed. 1942) 95-114.

jectively or reifying them (*p*), so that they were entitled to rank along with legal interests or estates, saving always the paramount claim of a person who acquired the legal estate for value in good faith and without notice (*q*). The partial assimilation of equitable interests and legal interests must, however, be considered in the light of Hohfeld's analysis of legal relations (*r*). There does not seem to be much point in insisting on the proprietary nature of an equitable interest, similar to the proprietary nature of a legal interest, in a thing, if interest or property denotes the normally beneficial side of a legal relation or of legal relations between persons with respect to a thing, or, in other words, varying aggregates of rights, privileges, powers and immunities, or one or some of them, with respect to a thing (*s*). The misleading expression *jus in rem* (*t*), by contrast with *jus in personam*, seems to suggest the untenable theory that there can be a right against a thing, as distinguished from right against a person or the benefit of a legal relation between persons with respect to a thing. In the conflict of laws this theory seems to underly the attempt to distinguish between proprietary rights or interests in land, governed by the *lex rei sitae*, and contractual or equitable rights with respect to land, possibly governed by some other law. The attempt tends to become futile if a so-called right *in rem* or right *in re* is merely the benefit of a legal relation between persons differing from a so-called right *in personam* only in the fact that the right is available against an undefined body of persons instead of being available against a definite person or definite classes of persons (*u*).

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(*p*) Notably in the case of a *cestui que trust's* interest in the trust *res*; cf. the covenantee's equitable interest in the land of the covenantor under a restrictive covenant, and the mortgagor's equitable estate in the mortgaged land.

(*q*) That is, even in equity, a legal estate had priority over an equitable interest or estate, other things being equal, and a legal estate was regarded as something different in kind from an equitable estate.

(*r*) As outlined earlier in the present § 2, and as in effect incorporated in the Property Restatement there quoted.

(*s*) See comment *b* on § 42, and the introductory note to chapter 7, of the Conflict of Laws Restatement, quoted earlier in the present § 2.

(*t*) Cf. Hohfeld, *Fundamental Legal Conceptions* (1923) 74 ff. As to the more plausible expression *jus in re*, contrasted with *jus ad rem*, see Hohfeld, *op. cit.*, 23, 86 ff.

(*u*) In Hohfeld's nomenclature a "multital" right as distinguished from a "paucital" right. See Hohfeld, *op. cit.*, p. 72.

Perhaps the true explanation of the distinction traditionally made in the conflict of laws between interests in land and personal rights with respect to land is that even though the distinction may disappear on exact analysis, there may be sound reasons of social convenience or practical expediency for resorting to the *lex rei sitae* as to some legal relations with respect to land and to some other law as to others, and that different conflict rules expressed in terms of the traditional distinction may be based on undisclosed but substantial reasons. This suggested explanation does not of course avoid the difficulty of drawing the line between interests in land and personal rights with respect to land, and in case of doubt, or if there is an irreconcilable conflict between a person's interest in the land and another person's right with respect to the land, it would seem that the *lex rei sitae* must prevail (*v*).

### § 3. Contract or Equity with Respect to Land.

Although it is almost universally stated that questions of the creation, acquisition, transfer and extinction of interests in land (immovable things) are governed as a general rule by the *lex rei sitae*, that is, the law of the situs of the land (*a*), it has sometimes been held and more frequently assumed that questions arising from contracts with respect to land or questions of equities with respect to land may be governed by some other law, without sufficient or indeed much consideration of the difficulties inherent in the alleged distinction between interests in land and contractual or personal rights with respect to land (*b*), or without much or sufficient consideration of the possible conflicts between the rights of the parties existing under the *lex rei sitae* and the rights of the parties as declared by a court in an action in a country other than that of the situs of the land.

As distinguished from a conveyance of land or a mortgage of land or other dealing which directly affects the title to land, the transaction in question may be a contract with respect to land or a transaction which gives rise to an equity with respect to land, and it has been held that the contract may be governed by its own proper law distinct from the *lex rei sitae*, or the equity may owe its existence to, and be governed by,

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(*v*) As is suggested in § 3, *infra*.

(*a*) See § 1, *supra*.

(*b*) See § 2, *supra*.

some law other than the *lex rei sitae*. In any event, however, it would appear that the contract or equity must in its performance or enforcement comply with the *lex rei sitae* or at least not be repugnant to the *lex rei sitae*. Examples of transactions with respect to land which, as has been held, may be governed by some law other than the *lex rei sitae* are a contract for the sale of land, a contract to make a mortgage, or any other form of equitable mortgage operating, by way of contract or executory assurance or otherwise, as an equitable charge on land.

In *Polson v. Stewart* (c) Holmes J. said:

It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the *res* . . . But the same reason inverted establishes that the *lex rei sitae* cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it.

Accordingly, the learned judge held that a contract made in North Carolina between husband and wife for the conveyance of land situated in Massachusetts was enforceable in Massachusetts, because it was valid as a contract by the domestic law of the place of making, though invalid by the domestic law of the situs of the land. The result can hardly be called satisfactory (d).

In the Conflict of Laws Restatement it is said, in a comment on § 340 (e):

There is a distinction between a contract to transfer an interest in land and the transference of the interest. The latter is governed by the law of the state where the land is. A contract to transfer land may, it is true, operate as a transfer of an equitable interest. Whether it so operates depends upon the law of the state where the land is (f). Thus, a contract to transfer an interest in land may be valid as a contract but inoperative as an actual transfer; and the fact that it is so inoperative does not affect its validity as a contract.

In *Ex parte Pollard, In re Courtney* (g) the title to certain land in Scotland was vested in one George Courtney, but the land was held by him as partnership property on behalf of a

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(c) (1897), 167 Mass. 211, Lorenzen, Cases on the Conflict of Laws (5th ed. 1946) 552.

(d) Cf. Stumberg, Conflict of Laws (1937), 347, citing this and other cases as examples of the "possibilities of confusion" inherent in the distinction between questions of title to land and questions of contract.

(e) § 340 is quoted in § 2, *supra*.

(f) See § 239, quoted in § 2, *supra*.

(g) (1840), Mont. & Ch. 239. See also *Ex parte Holthausen, In re Scheibler* (1874), L.R. 9 Ch. 722.

firm of which he was a partner. The firm, being indebted to one George Pollard, and in consideration of further credit to be given by him, deposited with him the title deeds and signed and delivered to him a memorandum declaring that they gave him a lien upon the land, agreeing that he should stand as an equitable mortgagee of the land, and undertaking on demand to do all such acts as should better secure the money advanced. There was a finding, stated in a special case, that by the law of Scotland the deposit and memorandum did not create any lien or equitable mortgage upon the land. The firm having become bankrupt, and there being a contest between Pollard and the assignees in bankruptcy on behalf of the unsecured creditors, it was held by Lord Cottenham L.C., reversing the Court of Review, that effect should be given to the equitable mortgage, there being no competitors claiming a title to the land by the law of Scotland, and the only parties resisting the claim being the assignees, who were bound by all the equities which affected the bankrupts. The transaction was, it was held, one of which the court might have decreed specific performance and completion in accordance with the forms of the law of Scotland, without violating any rule of that law.

In the case just mentioned Lord Cottenham said that according to the finding as to the law of Scotland it must be understood merely that the law of Scotland did not permit the deposit and agreement to operate *in rem*, and not that they might not give a right to relief *in personam*; and he added (*h*):

If indeed the law of the country where the land is situate should not permit, or not enable, the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities.

It follows that if the *lex rei sitae* positively excludes the operation of the equitable doctrine on which the court is asked to act *in personam*, the court will decline to interfere (*i*); in other words, a court ought not to pronounce a decree, even *in personam*, which can have no specific operation without the

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(*h*) *Ex parte Pollard, In re Courtney* (1840), Mont. & Ch. 239, at p. 250; cf. Westlake, *Private International Law*, § 172; Dicey, *Conflict of Laws* (5th ed. 1932), notes to rule 150.

(*i*) Cf. Foote, *Private International Law* (5th ed. 1925) 230.

intervention of a foreign court, and which in the country in which the land is situated would probably be treated as a *brutum fulmen* (j).

The decision in *Ex parte Pollard* appears nevertheless to be open to criticism, at least from the point of view of modern English and Canadian bankruptcy law. That law distinguishes between secured creditors and unsecured creditors and crystallizes their respective rights at the time when the declaration of bankruptcy, or, alternatively, in Canada, when the authorized assignment, becomes effective. At that time the creditor had no present charge on the land by the *lex rei sitae*, although he had the right by the law of England and by the law of Scotland to relief *in personam*, and by the law of England had a present equitable mortgage. It would seem that he ought not to have been allowed to rank as a secured creditor because at the material time he was not such by the *lex rei sitae*. It is true that there was no competing creditor claiming a charge on the same land, but there were presumably other unsecured creditors who were prejudiced by the allowance of the claim. If the debtor had not been declared a bankrupt, the decision would be unobjectionable.

In *British South Africa Co. v. DeBeers Consolidated Mines* (k), Cozens-Hardy M.R. said (l):

In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage which—*inter partes*—is to be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage.

The contract in question provided for loans to be made by the defendant to the plaintiff, on the security of a floating charge contained in debentures to be issued by the plaintiff. The loans having been advanced and having subsequently been repaid, the plaintiff sued for a declaration that a certain clause (by which the plaintiff undertook to grant to the defendant an exclusive license to work all diamondiferous ground to which the plaintiff was or might be entitled in certain territory) was

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(j) *Norris v. Chambres* (1860), 3 DeG. F. & J. 584, at p. 585, Lord Campbell.

(k) [1910] 2 Ch. 502.

(l) [1910] 2 Ch. 502, at p. 515; cf. Kennedy L.J. at p. 524. Both passages were cited with approval by Eve J. in *In re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206, at p. 209. See also *In re The Anchor Line*, [1937] Ch. 483.

not binding on the plaintiff on the ground that it was a clog on the equity of redemption. It was held by the Court of Appeal that the proper law of the contract was English, it having been made in England in English form, with respect to land in England as well as land in South Africa, notwithstanding that the clause in question was invalid by English law (*m*) and perhaps valid by South African law. Even as to the land in South Africa it was held that the contract was governed by English law because it did not create a real right, but merely a personal right which an English court might enforce *in personam*.

Westlake (*n*) states that "contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution." This doctrine, including its saving clause, is supported by the cases already mentioned, which presuppose that the law governing a contract with respect to land may be different from the *lex rei sitae*. Conveyances of land are of course outside the scope of Westlake's rule, as he makes clear in another rule (*o*). Furthermore, the proper law of a contract with respect to land is generally the same as the *lex rei sitae*, either because the parties generally intend the contract to be governed by the *lex rei sitae* (*p*), or, better, because the country of the situs is generally the country with which the transaction has the most real connection (*q*).

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(*m*) The judgment was reversed by the House of Lords on the ground that the stipulation for a license was severable from the mortgage transaction and therefore was not a clog on the equity of redemption: *De Beers Consolidated Mines v. British South Africa Co.*, [1912] A.C. 52.

(*n*) Private International Law, § 216. See Dicey, *Conflict of Laws* (5th ed. 1932), appendix, note 20, for a discussion of Westlake's proposition, and the alternative doctrine that the *lex rei sitae* is the governing law.

(*o*) See § 1, *supra*, and Westlake's § 156 there quoted.

(*p*) Dicey's rule 163, stating that the proper law is generally, though not necessarily, the *lex rei sitae*, must be read along with his rule 155, defining the proper law as the law by which the parties intended, or may fairly be presumed to have intended, the contract to be governed. This "intention doctrine" is stated in an extreme form by Lord Wright in *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, [1939] 2 D.L.R. 1, [1939] 1 W.W.R. 433; cf. my comment, with references to the views of various writers, in chapter 16, § 3.

(*q*) Westlake, *op. cit.*, § 212.

In *Bradburn v. Edinburgh Assurance Co.* (r) an application for a loan was made in Ontario to the local solicitors of a company having its head office in Scotland, and the loan was approved by an advisory committee in Ontario, and the application was then forwarded to and accepted by the directors in Scotland, the applicant being notified of the acceptance by cablegram. The money was then advanced in Ontario upon the security of a mortgage of land situated in Ontario, the mortgage containing a proviso for defeasance on payment of the principal and interest at a specified bank in England, and a provision that payment might be made by bank draft on London, England, payable to the mortgagee, and either delivered to the Ontario agent of the mortgagee or posted in Ontario addressed to the specified bank and duly registered. It was held that the law of Canada governed the contract and its incidents. The question being whether the Dominion Interest Act applied, it was not necessary in the circumstances to distinguish between the law of Ontario and that of any other province.

As regards the formal validity of a contract with respect to land, the governing law is the *lex rei sitae*, if the contract includes, or forms part of, an instrument intended to convey an interest in land (s). If, however, no conveyance is in question, it is sometimes said that some law other than the *lex rei sitae* may apply, and that this must inevitably be the case as to a contract which creates an equitable mortgage of foreign land where this kind of mortgage is not recognized by the *lex rei sitae* (t). The general rule being that the formalities of a contract are governed by the *lex loci celebrationis*, it would seem that this is the law which should govern the formal validity of a contract to land if the *lex rei sitae* is inapplicable, but there is some support (u) for the view that the governing law should be the proper law of the contract. In any event it must rarely happen that the proper law of a contract with respect to land is neither the *lex rei sitae* nor the *lex loci celebrationis*.

From a practical, if not theoretical, point of view, it would appear to be desirable that, apart from questions of procedure,

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(r) (1903), 5 O.L.R. 657.

(s) As to the formal validity of a conveyance of an interest in land, see § 1, *supra*.

(t) Dicey, *Conflict of Laws* (5th ed. 1932) 586-588; cf. the cases already cited in the present § 3.

(u) Cf. Dicey, *op. cit.*, rule 163.

a court, if it does not decline jurisdiction altogether (*v*), ought to apply the *lex rei sitae*, so far as the circumstances permit, to the enforcement of any contract with respect to land. It is of course impossible for a court in one country to give a judgment which will be effective *in rem* as regards a thing situated in another country, and when a court grants relief *in personam* in accordance with some law other than the *lex rei sitae*, there is always the danger that the court may create rights and duties inconsistent with the real relation of the parties *inter se* as regards the land, and perhaps inconsistent with the rights and duties of the parties as they may be subsequently declared by a court of the situs.

#### § 4. Jurisdiction of Courts.

It is only a court of the country in which land is situated that can effectively grant any remedy enforceable *in rem* or give a judgment or make an order directly affecting the title to land or the possession of land; and while it is not clear that there is any rule of international law by which a court having jurisdiction over the defendant would be prevented from entertaining proceedings with respect to foreign land merely on the ground that the proceedings would be ineffective as regards the land, English courts do not assume jurisdiction to deal directly with the title to or the possession of foreign land (*a*), and do not, or ought not to, adjudicate on any matter with regard to which they cannot give an effective judgment (*b*).

On the other hand, it is common for the courts of a country to entertain actions in circumstances in which they would not admit that the jurisdiction is sufficiently founded to entitle the judgment of a foreign court, pronounced in similar circumstances, to be recognized as internationally binding; whereas the true question for private international law in the matter of jurisdiction is not what actions are entertained by the courts of a given country, but in what cases these courts will recognize

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(*v*) As to jurisdiction, see § 4, *infra*, where it is suggested that courts should be cautious with regard to adjudicating on claims with respect to foreign land.

(*a*) Cf. Foote, *Private International Law* (5th ed. 1925) 224; *Deschamps v. Miller*, [1908] 1 Ch. 856, and cases cited in the argument; *British South Africa Co. v. Companhia de Moçambique*, [1893] A.C. 602, at p. 624; *Ross v. Ross* (1892) 23 O.R. 43.

(*b*) Dicey, *Conflict of Laws* (5th ed. 1932) 30 ff. ("principle of effectiveness," or "test or criterion of effectiveness").

foreign judgments (c). It is not, however, intended to discuss here this "true question for private international law," but it is proposed to indicate some leading principles governing the actual practice of the courts in entertaining actions of a personal character (d) which relate to land situated abroad.

At common law it was necessary, as a general rule, that the writ by which an action was commenced should be served on the defendant personally "within the realm." This general rule has of course been departed from in so far as by statute, or by rules of practice made under statutory authority, authority has been conferred upon a court to give leave for service abroad of a writ, or, in the case of an alien defendant, notice of a writ, in certain specified classes of cases. More obviously than in the cases in which jurisdiction is based upon service "within the realm," the result is to enlarge the classes of cases in which a court may entertain an action although it would not admit that the judgment of a foreign court pronounced in similar circumstances is internationally binding (e). The question whether a court should have power to entertain actions against absent defendants and give judgments which, though effective within the territory of the forum, may not be recognized as valid elsewhere, is a matter of policy for the legislature and not for the courts (f). The power conferred by the legislature should, however, be exercised with caution, so as to avoid doing injustice (g), and regard should be had to the question whether the domestic forum or the foreign forum is more convenient for the trial of the matter in controversy (h).

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(c) Westlake, *Private International Law*, chapter 10. Generally, as to foreign judgments, see Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938).

(d) All proceedings in the courts of common law in England were personal in character; they did not operate *in rem*. *Castrique v. Imrie* (1870), L.R. 4 H.L. 414, at p. 428, 5 R.C. 899, at p. 906, Blackburn J.

(e) Cf. Read, *op. cit.* (note (c), *supra*) 127-131.

(f) *McMulkin v. Traders Bank of Canada* (1912), 26 O.L.R. 1, 6 D.L.R. 184; *Western National Bank of City of New York v. Perez*, [1891] 1 Q.B. 304, at p. 311.

(g) *Richer v. Borden Farm Products Co.* (1921), 49 O.L.R. 172, 64 D.L.R. 70.

(h) *Gibbons v. Berliner Gramophone Co.* (1912), 27 O.L.R. 402, 8 D.L.R. 471, reversed (1913), 28 O.L.R. 620, 13 D.L.R. 376; *Brenner v. American Metal Co.* (1920), 48 O.L.R. 525, 57 D.L.R. 743, affirmed (1921), 50 O.L.R. 25, 64 D.L.R. 149. As to the question of

and, especially if the defendant to be served is a foreigner, any doubt that may exist as to the propriety of giving leave for service of the writ should be resolved in the defendant's favour (i).

If the writ is served personally on the defendant within the territory of the forum a judgment may be obtained against him, notwithstanding that his domicile and nationality are foreign, and that his presence within the territory is temporary (j), provided that he was not enticed within the territory (k) or brought within the territory by the use of unlawful force (l).

There was also a limitation as to jurisdiction based upon personal service of the writ within the realm, namely, that in the case of a local, as distinguished from a transitory, action, the cause of action must have occurred within the realm. A local action was one the cause of which could not have occurred elsewhere than where it did occur, as, for example, an action for trespass to land, and the rules of venue, requiring the summoning of a jury from the county in which the cause occurred, prevented an English court from entertaining a local action if the land in question was outside the realm. Since the passing of the Judicature Act and notwithstanding the abolition of the requirement of local venue for the trial of an action, it was held by the House of Lords in *British South Africa Co. v. Companhia de Moçambique* (m) that a court in England has no jurisdiction to entertain an action to recover damages for trespass to land situated abroad, there being solid reasons why the court should refuse to give damages founded on an adjudication of the proprietary rights attached to such land.

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*forum conveniens*, see especially *In re Schintz*, *Schintz v. Warr*, [1926] Ch. 710; cf. *Ocean S.S. Co. v. Queensland State Wheat Board*, [1941] 1 K.B. 402, and comment in chapter 16, § 4.

(i) *The Hagen*, [1908] P. 189, at p. 201; *In re Schintz*, *supra*.

(j) Cf. *Western National Bank of City of New York v. Perez*, [1891] 1 Q.B. 304, at pp. 310, 311; Read, *op. cit.* (note (c), *supra*) 149. The action may, however, be stayed or dismissed on the ground that the domestic forum is not the *forum conveniens*. *Egbert v. Short*, [1907] 2 Ch. 205; *In re Norton's Settlement*, *Norton v. Norton*, [1908] 1 Ch. 471; Read, *op. cit.* (note (c), *supra*) 131.

(k) *Watkins v. North American Land and Timber Co.* (1904), 20 Times L.R. 534; *Lewis v. Wiley* (1923), 53 O.L.R. 608.

(l) 1 Beale. *Conflict of Laws* (1935) 341; cf. *Lawrence v. Ward*, [1944] 2 D.L.R. 724, [1944] O.W.N. 199.

(m) [1893] A.C. 602.

The scope of the decision in the *British South Africa* case was discussed in *St. Pierre v. South American Stores (n)* by Scott L.J., who, commenting on some observations of Lord Herschell in the earlier case said, "By these words I understand him to have meant that it is the action founded on a disputed claim of title to foreign lands over which an English court has no jurisdiction, and that where no question of title arises, or only arises as a collateral incident of the trial of other issues, there is nothing to exclude the jurisdiction." In this case the Court of Appeal held that an action for the repayment of rent under a lease of land situated in Chile is a personal action, transitory in its nature, which may be entertained by an English court, notwithstanding that it relates incidentally to foreign land. On the other hand, the rule stated in the *British South Africa* case has been applied and perhaps extended in other cases in which the courts have refused to exercise jurisdiction (o).

After the writ of subpoena was invented, the Court of Chancery based its jurisdiction upon service of the writ within the realm either upon the defendant personally or upon some person at the defendant's dwelling-house whose duty it would be to communicate the fact to him. As there was no jury in Chancery, there was no venue, and therefore no formal or procedural obstacle to the court's making its personal jurisdiction over the defendant a ground for determining the title to, or the right of possession of, foreign land. It appears now to be settled, however, that it ought not to do so (p).

In *Deschamps v. Miller (q)* Parker J. said:

In my opinion the general rule is that the court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive

(n) [1936] 1 K.B. 382.

(o) *Brereton v. Canadian Pacific Ry. Co.* (1894), 29 O.R. 57 (an action, not of trespass, but of trespass on the case, for damages for the destruction by fire of a house on land situated in Manitoba); *Albert v. Fraser Companies* (1936), 11 M.P.R. 209, [1937] 1 D.L.R. 39 (an action in New Brunswick for damages to land situated in Quebec alleged to be caused by the negligent obstruction of the flow of a river running through both provinces). Both cases are discussed and criticized by Read, *Recognition and Enforcement of Foreign Judgments* (1938) 187 ff.; cf. comment on the latter case by Willis (1937), 15 Can. Bar Rev. 112.

(p) Westlake, *Private International Law* (7th ed. 1925) 243-245; cf. *ibid.*, § 173.

(q) [1908] 1 Ch. 856, at pp. 863-864.

statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a court of equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the *locus* the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the court ought to entertain jurisdiction to decide the matter.

The classic example of the exercise by a court of jurisdiction to give relief with respect to land situated abroad under the guise of an order directed to a person who is within the jurisdiction is the venerable case of *Penn v. Lord Baltimore* (r), in which the Court of Chancery in England decreed specific performance of a contract providing for the delimitation of the boundary between two provinces in North America. Even if relief given with regard to land situated abroad is supposed to be limited to cases in which the relief is not repugnant to the *lex rei sitae* (s), embarrassing questions suggest themselves, namely, whether a court of the country in which the land is situated will accord any recognition to an adjudication by a foreign court on the merits of a dispute with respect to land, or what it may have to say about a conveyance of land made under the coercion of a foreign court, or, conversely, what will be the attitude of an English court as regards a personal judgment of a foreign court with respect to land situated in England (t).

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(r) (1750), 1 Ves. Sen. 444, 1 White & Tudor L.C. (9th ed. 1928) 638.

(s) Cf. *Ex parte Pollard, In re Courtney* (1840), Mont & Ch. 239, at p. 250 (see § 3, *supra*); *Bank of Africa v. Cohen*, [1909] 2 Ch. 129. As to the latter case, see chapter 31, § 2.

(t) Cf. Corry, comment (1933), 11 Can. Bar Rev. 211, on *Andler v. Duke* (1931), 45 B.C.R. 96, [1932] 2 D.L.R. 19, [1932] 1 W.W.R. 257. In the Supreme Court of Canada, *sub nom. Duke v. Andler*, [1932] S.C.R. 734, [1932] 4 D.L.R. 529, the judgment of the Court of Appeal for British Columbia was reversed, and it was held that no effect should be given in British Columbia to a judgment of the Superior Court of California by which it was ordered that the defendants should convey to the plaintiffs certain parcels of land situated in British Columbia, or to a conveyance made by the clerk

It has been held that foreclosure may be decreed against a mortgagor who is within the jurisdiction, with respect to land outside the jurisdiction, because the foreclosure operates merely *in personam* by extinguishing the defendant's personal and equitable right to redeem (*u*), and that an order may be made directing the defendant to execute such conveyance as will vest the legal title in the plaintiff (*v*). The court will not, however, order a sale of land outside the jurisdiction, because it is not able to supervise or deal effectually with the many matters which are the usual and ordinary incidents of a sale (*w*) nor will it entertain an action directly involving a decision as to title to land without the jurisdiction (*x*).

The jurisdiction to decree foreclosure with respect to land situated in another country is not easy to justify. As Westlake points out (*a*), to decree foreclosure on the debtor's failure to pay would appear to be contrary to the principle that the court "will decline to make its mere personal jurisdiction over the defendant a ground for determining the right either to the property or the possession of foreign immovables," and "it can hardly be supposed that the *forum situs* of the security would allow any authority to such a decree, if by the *lex situs* the mortgage was still redeemable, and proceedings were taken to redeem it."

Obviously the jurisdiction, so far as it exists, ought to be exercised with great caution. As Lord Macnaghten said in a different but analogous kind of case, "there is, perhaps, some danger of doing injustice if the strict rules which the English Court of Chancery has applied to dealings with trust property are applied to a case between foreigners under foreign law whose relations are not exactly those of trustee and *cestui que trust*" (*b*); so, even as between persons who are, or as against

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of the court pursuant to the order of the court on the failure of the defendants to convey. See Gordon, *The Converse of Penn v. Lord Baltimore* (1933), 49 L.Q. Rev. 547.

(*u*) *Toller v. Carteret* (1705), 2 Vern. 494; *Paget v. Ede* (1874), L.R. 18 Eq. 118; *In re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743.

(*v*) *Bryson v. Huntington* (1877), 25 Gr. 265.

(*w*) *Strange v. Bedford* (1887), 15 O.R. 145; *Grey v. Manitoba and North Western Ry. Co.*, [1897] A.C. 254, affirming (1896), 12 Man. R. 42.

(*x*) *In re Hawthorne, supra*; *Ross v. Ross* (1892), 23 O.R. 43.

(*a*) Private International Law, § § 173, 174.

(*b*) *Concha v. Concha*, [1892] A.C. 670, at p. 675.

a defendant who is, within the jurisdiction, there is certainly danger of injustice being done when a court decrees foreclosure with respect to foreign land without first ascertaining that the relation of the parties according to the *lex rei sitae* is exactly that of mortgagee and mortgagor in the sense of the *lex fori*. If the *lex rei sitae* as to securities on land is essentially different from the *lex fori*, as, for example, if foreclosure were sought in an English or Ontario court as to land in France or Quebec, it would be obvious that the court should decline jurisdiction, the remedy asked for being wholly inappropriate to, and therefore repugnant to, the hypothecary system of the *lex rei sitae*, in which there is no conditional conveyance, no forfeiture, no equity of redemption and therefore no foreclosure. Even if the discrepancy between the *lex fori* and the *lex rei sitae* were less glaring, as, for example, if foreclosure were sought in an Ontario court as to land registered under the Real Property Act of Manitoba, there might be insuperable objections to the court's entertaining the action. Apart from the fact that a mortgage under that statute, as under the Land Titles Acts of Alberta and Saskatchewan, operates merely by way of charge, there is the further objection that in Manitoba foreclosure cannot be obtained by application to a court, but must be sought by proceedings in the registrar's office, and that, normally at least, foreclosure cannot be had until after the mortgaged property has been offered for sale under the direction of the registrar. In other words, strict foreclosure as it exists in Ontario practice does not exist under the Real Property Act of Manitoba. It is doubtful, indeed, whether there are many countries in the world in which strict foreclosure still exists, and therefore doubtful whether a case is likely to arise in which an Ontario court should entertain an action for foreclosure with respect to land outside of Ontario. In more general terms, it is submitted that when a court today is asked to decree foreclosure with respect to land in another country, it is necessary for the court, as a condition of entertaining the application, to find that the relation of mortgagee and mortgagor according to the *lex rei sitae* is essentially the same as their relation according to the *lex fori*, and that, apart from the simple case of an action upon the covenant for payment (c), a court is not justified in assuming that a remedy available to

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(c) See *Northern Trusts Co. v. McLean* (1926), 58 O.L.R. 683, [1926] 3 D.L.R. 93.

a mortgagee by the *lex fori* is appropriate in the case of land situated in another country (d).

When the court allows a mortgagor to redeem after default, the relief given is personal in its nature, and therefore it has been held that the court, acting *in personam* (e), may entertain an action for redemption against a mortgagee who is within the jurisdiction, notwithstanding that the land in question is outside the jurisdiction (f). Nevertheless, it would appear that relief ought not to be granted as to land outside the jurisdiction without due regard to the *lex rei sitae*, otherwise the court might use its mere personal jurisdiction over the defendant to take from him land indefeasibly vested in him by the *lex rei sitae*; but it has been said that if the defendant is bound by some special contract, not merely an incident to the security, the court would be justified in applying the proper law of the contract (g).

The court will not, however, grant relief by a decree *in personam* with respect to land outside the jurisdiction unless there is some contractual obligation, express or implied, or some trust, or other ground for imposing a personal obligation on the defendant. Thus, in an action in Ontario the court refused a decree for redemption of a mortgage on land in Manitoba at the suit of a judgment creditor of the mortgagor, whose judgment was by Manitoba statute a charge upon the land, the judgment creditor and the mortgagee both being domiciled in Ontario (h). The statutory charge did not create any personal obligation, and in the *forum rei sitae* and according to the *lex rei sitae* was enforceable only by sale of the land. In the

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(d) When an English court formerly exercised jurisdiction to decree foreclosure as to land in one of the colonies it was perhaps justified in some cases in assuming that the *lex rei sitae* was essentially the same as the law of England as regards the relation of mortgagee and mortgagor, so that in effect the court's assumption of jurisdiction was not complicated by any question of conflict of laws. This observation would not be applicable, however, to *Toller v. Carteret*, note (u), *supra*.

(e) *Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444, 1 White & Tudor L.C. (9th ed. 1928) 638.

(f) *Beckford v. Kemble* (1822), 1 Sim. & St. 7; *Bent v. Young* (1838), 9 Sim. 180.

(g) Westlake, *Private International Law*, § 174.

(h) *Henderson v. Bank of Hamilton* (1893), 23 Can. S.C.R. 716, affirming 20 O.A.R. 646.

Supreme Court of Canada, Strong C.J., delivering the judgment of the court, said (i):

The tendency of modern decisions has been to decline jurisdiction with reference to foreign land, and when we consider that if the arguments invoked for the present appellants were to prevail we might be asked to uphold a judgment of a Quebec court in an hypothecary action respecting lands in Ontario, or *vice versa* a judgment in the Ontario courts directing a sale of hypothecated immovables in the province of Quebec, the convenience, good sense and sound jurisprudence of the rules laid down in the later English authorities, which have now culminated in the decision of the House of Lords in the case of *British South Africa Co. v. The Companhia de Moçambique* (j), became at once apparent. It is unnecessary to write more fully, as Mr. Justice Osler in his very able judgment in the Court of Appeal, and which proceeds on the same *ratio decidendi* as the judgment of this court, has fully expounded the principle upon which it must be held that the Ontario courts have no jurisdiction to entertain this action.

The court will not entertain an action to set aside a mortgage of land outside the jurisdiction and to declare the defendant a trustee (on the ground that the mortgage was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed) or, in effect, give the plaintiff relief by way of equitable execution out of the mortgagee's interest (k), or an action for a declaration that a deed in the form of an absolute conveyance of land outside the jurisdiction is really a mortgage (l). Especially if the transaction in question occurred outside the jurisdiction, a court ought not to entertain proceedings to enforce an equity which may not exist by the law of the place in which the transaction occurred and in which the land was situated, so as to deprive a person of a title which he may have by the *lex rei sitae* (m).

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(i) 23 Can. S.C.R. 716, at p. 722.

(j) [1893] A.C. 602, already cited earlier in the present § 4.

(k) *Purdom v. Pavey* (1896), 26 Can. S.C.R. 412, reversing *Pavey v. Davidson* (1896), 23 O.A.R. 9; *Burns v. Davidson* (1892), 21 O.R. 547.

(l) *Gunn v. Harper* (1901), 2 O.L.R. 611.

(m) *Gunn v. Harper* (1901), 2 O.L.R. 611, at pp. 615, 616, Osler J.A. At pp. 619 ff., Moss J.A. suggests that in order to give the court jurisdiction to entertain an action relating to foreign land, not only must the defendant be within the jurisdiction but the contract or equity must have been made or have arisen within the jurisdiction.

## CHAPTER XXXI.

### CAPACITY AND POWER\*

§ 1. Powers of personal representative, p. 543.

§ 2. Capacity to change status or legal relations, p. 545.

#### § 1. Powers of Personal Representative.

If a mortgagee of land situated in Ontario dies, it would appear that his personal representative must obtain a grant of probate or letters of administration from an Ontario court in order to enable him to give a valid release or discharge of the mortgage. It is clear that a foreign administrator cannot validly discharge a mortgage without a local grant of administration (*a*), but in the case of an executor who proved the will in another country, and registered the will and the foreign probate in the registry office in Ontario in which the mortgage was registered, it was held that he could give a valid discharge of the mortgage without proving the will in Ontario or having the probate sealed in Ontario (*b*). The decision with regard to the foreign executor appears, however, to be of doubtful authority (*c*), and would seem to be wrong on principle. A certificate of discharge of mortgage which on registration will operate as a discharge of the mortgage and as a conveyance of the land must be given by the mortgagee, by his executors, administrators or assigns, or by such other person as may be entitled to receive the mortgage money and to discharge the mortgage. It is submitted that in the case of the mortgagee's death the personal representative who can give a valid discharge must be one duly appointed according to the *lex situs* of the land (there being no difference in this respect between an executor and an

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\*This chapter reproduces § 7 of an article, entitled *Immovables in the Conflict of Laws*, published (1942), 20 Canadian Bar Review 123-133, subsequently forming part of a chapter, bearing the same title, in my *Law of Mortgages* (3rd ed. 1942) 806-818. Some passages discussing an agent's authority and power have been transferred to chapter 18.

(*a*) *In re Thorpe* (1868), 15 Gr. 76.

(*b*) *Re Green and Flatt* (1913), 29 O.L.R. 103, 13 D.L.R. 547.

(*c*) *Rs McKay* (1920), 18 O.W.N. 101.

administrator), and that a conveyance by the personal representative is governed by the same principle (*d*).

In *Re Landry and Steinhoff* (*e*) a woman domiciled in Louisiana, holding a mortgage of land situated in Ontario, but not owning any other property there, made a holograph will, valid in Louisiana, giving her whole estate to her sister and appointing her executrix. The will was admitted to probate in Louisiana and ancillary probate, limited to personal property, was granted to the executrix in Ontario. The executrix subsequently brought an action in Ontario and obtained a final order of foreclosure. It was held that she could not convey a good title to the land to a purchaser. The will was inoperative by the *lex rei sitae* as regards any interest in land in Ontario and therefore the executrix could not rely on the provision of the Ontario Devolution of Estates Act that "where an estate or interest in real property is vested . . . by way of mortgage in any person solely the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner as if the same were personal estate vesting in him" (*f*). The result is relatively clear when it is borne in mind that succession to any interest in immovables is governed by the *lex rei sitae* though that interest is classified as personal property, but in the reasons for judgment the result is obscured by the fact that it is stated that succession to personal property is governed by the *lex domicilii*, but that by way of exception this rule does not apply to a chattel interest in land or to the interest of a mortgagee of land. The testatrix was not a British subject, and therefore the executrix could not rely on Lord Kingsdown's Act (*g*), which if the testatrix had been a British subject would have rendered the will formally valid as regards personality.

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(*d*) *Re Green and Platt* was followed in *Re National Trust Co. and Mendelson*, [1941] O.W.N. 435, [1941] 1 D.L.R. 438, and, without any reference to the Devolution of Estates Act, R.S.O. 1937, c. 163, s. 20, sub-s. 7, was applied to a conveyance of real property by an executor without local grant of probate. A comment on the latter case is contained in chapter 27.

(*e*) [1941] O.R. 67, [1941] 1 D.L.R. 699. A comment on this case is contained in chapter 24.

(*f*) R.S.O. 1937, c. 163, s. 7.

(*g*) As to Lord Kingsdown's Act, see chapter 23.

In *Re Gauthier* (*h*) the testatrix was a British subject, domiciled in Quebec, who made there a holograph will, valid by the domestic law of Quebec and therefore, by virtue of Lord Kingsdown's Act, formally valid in Ontario as regards "personal estate." It was held that the will was effective as regards money payable to the testatrix under a mortgage upon land situated in Ontario held by her at the time of her death. Only the right to the mortgage money was in question, but it is submitted that even if the mortgagee's estate in the land had been in question, as it was in *Re Landry and Steinhoff*, that estate would, like the right to the mortgage money, be "personal estate" within the meaning of Lord Kingsdown's Act (*i*).

A further question is whether a foreign personal representative may in any circumstances be entitled to enforce or to receive payment of the mortgage debt so as to be able to give a valid receipt to the mortgagor and consequently be able to execute a valid discharge of the mortgage (*j*). The situs of the mortgage debt is the same as the situs of the land (*k*) and therefore the mortgage debt would be part of the assets to be administered by the personal representative appointed in the country in which the land is situated, and would be outside the scope of the grant of probate or administration made by the court of any other country. It would seem clear in such a case that a payment made to a foreign personal representative would not afford any defence to the person paying as against a personal representative appointed in the country of the situs (*l*).

## § 2. Capacity to Change Status or Legal Relations.

As regards a person's capacity to bind himself by contract or otherwise or to effect a change in his status or in his legal

(*h*) [1944] O.R. 401, [1944] 3 D.L.R. 401.

(*i*) See comment on the *Gauthier* case in chapter 25.

(*j*) Cf. *Whyte v. Rose* (1842), 3 Q.B. 493, at p. 509; *White v. Hunter* (1841), 1 U.C.R. 452; *Fidelity Trust Co. v. Fenwick* (1921), 51 O.L.R. 23, 64 D.L.R. 647; *Crosby v. Prescott*, [1923] S.C.R. 446, [1923] 2 D.L.R. 937, [1923] 2 W.W.R. 569.

(*k*) *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, 46 D.L.R. 318, [1919] 2 W.W.R. 354; cf. *In re Hoyles*, [1911] 1 Ch. 179, and chapter 26.

(*l*) See Dicey, *Conflict of Laws* (5th ed. 1932) 519-520; Foote, *Private International Law* (5th ed. 1925) 324-326; cf. Westlake, *Private International Law*, § 98.

relations with other persons or to transfer or affect an interest in land or in movable things, confusion is likely to result in the conflict of laws from the failure to characterize exactly the question arising for adjudication (*m*). A question of status must be distinguished from a question of the incidents or consequences of status and from a question of capacity (*n*). Again, a question of capacity cannot be characterized in the abstract as a single question governed by the law which governs a person's status or any single law. Capacity is not an independent concept which can be divorced from the particular kind of transaction in which the question of a person's capacity may arise. We must distinguish between and treat as different questions capacity to marry (characterized as a matter of intrinsic validity of marriage), capacity to succeed to immovables or movables on the owner's death (characterized as a matter of succession), capacity to make a marriage contract or settlement (characterized as a matter of intrinsic validity of either contract or conveyance), capacity to make a commercial contract (characterized as a matter of intrinsic validity of contract), and so on.

The capacity of a beneficiary to give a valid receipt for his share of the estate of a deceased person may be governed by the law of his domicile or, if the matter is regarded as one of succession, by the law which governs the distribution of the beneficial interest on succession, that is, in the case of movables, the *lex domicilii* of the deceased person (*o*), or, in the case of immovables, by the *lex rei sitae*. A person who is capable of taking and holding land by his personal law may nevertheless in a country in which he is an alien be incapable of doing so by the *lex rei sitae* (*p*).

As a general rule capacity to marry is governed by the domiciliary law of the parties. This rule applies at least to bilateral incapacity, as, for example, if both parties are within

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(*m*) The quite different question of the authority or power of an agent to bind his principal or to change the principal's relations with a third person is discussed in chapter 18.

(*n*) See chapter 4, § 8, and chapter 39.

(*o*) *In re Hellmann's Will* (1886), L.R. 2 Eq. 363; *In re Schnapper*, [1928] Ch. 420. Breslauer, *Private International Law of Succession* (1937) 103-104, submits that it was not the capacity of a minor as legatee that was important in each of these cases, but that the question was one of administration in England as regards a minor who was capable by the law of his domicile.

(*p*) *Cf.* Cheshire, *Private International Law* (2nd ed. 1938) 540, citing Story, *Conflict of Laws*, § 431.

the prohibited degrees of consanguinity or affinity by the law of their domicile or the laws of their respective domiciles (*q*). The case of unilateral incapacity, as, for example if only one of the parties is within the prohibited degrees by the law of his or her domicile, gives rise to difficulties which have not been adequately considered by English courts (*r*). In the case of a requirement as to parental consent to the marriage of minors there arises the difficult question whether the requirements should be characterized as a matter of capacity to marry or as a matter of formalities of celebration (*s*).

It would appear that capacity to make a marriage contract or settlement is governed, as a general rule, by the law of the domicile of each party (*t*), but it has been suggested that the governing law should be the proper law of the contract, which would usually be the law of the matrimonial domicile (*u*), and, subject to some observations to be made later, it would seem to be clear that to the extent that the transaction involves the conveyance of an interest in immovables or movables, the governing law is the *lex rei sitae* (*v*).

It is fairly clear that the law governing capacity to make an ordinary commercial contract is not the law of the domicile, and a preference has been expressed for the law of the place of contracting. It would seem, however, that capacity to contract is a phase of the intrinsic validity of a contract, and should be governed by the proper law of the contract in the sense of the law of the country with which the contract is most closely connected (*w*). At least as regards capacity to contract, it would seem to be clear that a party's power to select the proper law must be limited; he cannot confer capacity upon himself by

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(*q*) See chapter 40, § 9.

(*r*) See chapter 40, § 9.

(*s*) See chapter 4, §§ 1 and 2, and chapter 40, § 11.

(*t*) Cf. *Cooper v. Cooper* (1888), 13 App. Cas. 88.

(*u*) Morris, Capacity to make a Marriage Settlement in Private International Law (1938), 54 L.Q. Rev. 78; cf. Cheshire, Private International Law (2nd ed. 1938) 233 ff. See also *Duke of Marlborough v. Attorney-General*, [1945] Ch. 78, and comment by Morris (1945), 61 L.Q. Rev. 223.

(*v*) As to the conveyance of an interest in land, see chapter 30, § 1, and the subsequent discussion in the present chapter. As to the distinction between contract and conveyance, see chapter 30, § 2.

(*w*) See chapter 14, § 9.

selecting as the proper law the law of a country with which the alleged contract has no substantial connection (*x*).

Great difference of opinion exists with regard to the intrinsic validity of, including the capacity to make, an assignment of a non-negotiable chose in action (*a*). The least defensible view is that the assignment is governed by its own proper law; a better view is that the proper law of the assignment is the same as the proper law of the assigned chose in action (*b*); and perhaps the best view is that the assignment should be governed by the law of the situs of the chose in action so far as a situs can be attributed to a chose in action (*c*).

As regards the transfer *inter vivos* of an interest in land, and as regards a will of an interest in land, it would seem to be clear that the capacity of the transferor or testator is, generally speaking, merely a phase of the intrinsic validity of the transfer or will, and is therefore governed by the law of the situs of the land (*d*). With special reference to transactions *inter vivos*, it may, however, be doubtful in a particular case whether the question requiring adjudication should be characterized as one of capacity to convey land so as to fall within the scope of the rule that the *lex rei sitae* applies or should be characterized in some other way so as to make applicable some other law, notwithstanding that the transaction is one with respect to land.

One matter for discussion is whether capacity to make a contract with respect to land may be governed by the proper law of the contract as distinguished from the *lex rei sitae*. Westlake (*e*) states the rule that "the capacity of a person to contract with regard to immovables is governed by the *lex situs*," and in the only case cited by him in support of the rule, namely, *Bank of Africa v. Cohen* (*f*), the language of some of the judgments is clear in the same sense. The contract in question was, however, one by which a married woman, domiciled in England,

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(*x*) On the general question of the power of parties to select the proper law of a contract, and the limitations on that power, see chapter 16, § 3.

(*a*) See, e.g., *Republica de Guatemala v. Nunez*, [1927] 1 K.B. 669, C.A., affirming (1926), 95 L.J.K.B. 955, 42 Times L.R. 625.

(*b*) Cheshire, *Private International Law* (2nd ed. 1938) 449.

(*c*) Dicey, *Conflict of Laws* (5th ed. 1932), rule 153. See discussion of all three views in chapter 20.

(*d*) As to the intrinsic validity of a will of land, see chapter 22, § 2, and as to a transfer *inter vivos*, see chapter 30, § 1.

(*e*) *Private International Law*, § 165a.

(*f*) [1909] 2 Ch. 129.

by a deed executed in England, undertook to mortgage to a bank certain land in the Transvaal, the title deeds of which were already in the bank's possession for safe custody, as security for past and future advances to her husband, but without incurring personal liability, and, further, appointed the bank manager at Johannesburg her attorney to mortgage and transfer the land and to execute all necessary instruments for that purpose and to appear before the registrar of deeds at Johannesburg and take all necessary steps for registering the same, and authorized her attorney to declare in her name that she renounced in favour of the bank the benefit of all rights which the law of the Transvaal granted her with respect to the land in question. By virtue of two provisions of the Roman-Dutch law prevailing in the Transvaal a married woman (subject to certain immaterial exceptions) was incapable of becoming surety for her husband unless she expressly renounced the benefit of each of these provisions after having been informed of her rights thereunder, and the general renunciation contained in the power of attorney was insufficient for this purpose. The bank was therefore unable to secure registration of the documents evidencing its security upon the land, and subsequently the married woman refused to renounce the benefit of the two provisions in question, as she was entitled to do under the law of the Transvaal. It was held that the contract to give the mortgage was not valid and that the married woman was entitled to the return of the deeds.

The decision in *Bank of Africa v. Cohen* was based expressly upon the ground of incapacity to contract (*g*). It might perhaps have been based also on the ground or is perhaps an illustration of the rule (*h*) that in order to be valid or to secure priority under a system of registration of deeds or registration of titles an instrument must be in conformity with the *lex rei sitae*. The plaintiff in fact claimed specific performance of the agreement and an injunction restraining the married woman from charging or disposing of the land otherwise than to the bank. Either remedy was a remedy *in personam* and therefore one which an English court might have jurisdiction to

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(*g*) And the case was distinguished on this ground from *Ex parte Pollard, In re Courtney* (1840), Mont. & Ch. 239, discussed in chapter 30, § 3.

(*h*) See chapter 30, § 1.

grant with regard to foreign land (*i*), but the contract was one which was intended to have direct operation on the land in question, and in that case even Dicey would say that the parties to it must have capacity under the *lex rei sitae*, although in the case of a contract intended to operate as an equitable mortgage of foreign land (*j*) he says that capacity is governed by the proper law of the contract (*k*).

The court which decided *Bank of Africa v. Cohen* might, however, have considered the case from another point of view, and might have reached a different result. Even if it is assumed that the proper law was the *lex rei sitae*, it did not follow that the English court should confine its enquiry to the domestic rules of the law of the Transvaal. A court of a country other than that of the situs of the land should apply whatever domestic rules a court of the situs would apply, and the conflict rules of the *lex rei sitae* would usually, but not necessarily, refer to the domestic rules of the *lex rei sitae* (*l*). It would appear, however, that the English court did not enquire whether a court in the Transvaal would have applied domestic Transvaal law to the case of a married woman domiciled in England. Possibly a Transvaal court might have said that the domestic rules of the law of the Transvaal were limited in their application to married women domiciled in the Transvaal, and were inapplicable in the particular circumstances to the plaintiff. In that event the English court, in accordance with the *lex rei sitae*, might have held that the plaintiff, domiciled in England, was capable of contracting under her domiciliary law (*m*).

The case of *Landreau v. Lachapelle* (*n*) involves interesting questions of capacity in transactions with respect to land. Georg-

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(*i*) See chapter 30, § 3.

(*j*) As in *Ex parte Pollard, In re Courtney, supra*.

(*k*) Dicey, *Conflict of Laws* (5th ed. 1932), at the end of note 20, as to the Law governing Contracts with regard to Immovables. See also Dicey's rule 158, exception 2, and rule 150, exception 1.

(*l*) See chapter 22, § 3.

(*m*) Compare the parallel discussion, *infra*, of the case of *Landreau v. Lachapelle*, and see the discussion by Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 271, 274, of the cases of *Smith v. Ingram* (1902), 130 N.C. 100, 40 S.E. 984, and *Proctor v. Frost* (1938), 89 N.H. 304, 197 Atl. 813, and his earlier discussion, at p. 22, of *Milliken v. Pratt* (1878), 125 Mass. 374.

(*n*) [1937] O.R. 444, [1937] 2 D.L.R. 504, C.A., affirming [1936] O.R. 569, [1937] 1 D.L.R. 87.

iana Archambault and Cyrille Lachapelle, both domiciled at all times in the province of Quebec, were married in that province, having made an ante-nuptial contract negating community of property between them, and providing that they should be separate as to property, present or future. After the marriage the wife purchased land in Ontario, and was duly registered as owner under the Land Titles Act, her husband taking from her a charge on the land to secure repayment of money advanced by him in connection with the purchase. Subsequently he released the charge and she transferred the land to herself and him as joint tenants, and they were registered accordingly in the land titles office. The husband and wife having entered into a contract for the sale of the land, and the wife having died before the contract was completely performed, the husband was registered as sole owner, by virtue of his right as surviving joint tenant according to Ontario law, a right unknown to Quebec law. The executor of the wife then brought an action in Ontario against the husband, attacking the defendant's title. The Court of Appeal affirmed the judgment of the trial judge, dismissing the action.

The chief ground of attack on the defendant's title was that by Quebec law the provisions of a marriage contract cannot be altered after the marriage, and that neither consort can confer benefits *inter vivos* upon the other (article 1265 of the Civil Code of Lower Canada), and that husband and wife cannot enter into a contract of sale with each other (article 1483, *ibid.*). On the other hand, it is provided in Ontario, by the Land Titles Act (now R.S.O. 1937, c. 174, s. 105) that a married woman shall "for the purposes of this Act" be deemed a *feme sole*, and by the Married Women's Property Act (now R.S.O. 1937, c. 209, s. 2) that a married woman shall be capable of acquiring, holding and disposing of any property in the same manner as if she were a *feme sole*. It may be admitted at once that if a third party were claiming under a transfer for value from the husband as registered owner, the title of the transferee would be protected under the Land Titles Act, but in *Landreau v. Lachapelle* the issue with regard to the validity of the husband's title arose between him and the executor of the wife, unembarrassed by any claim of a purchaser for value. The decision was perhaps right in the result, but the court did not clearly distinguish the different phases of the question which presented itself for decision. It is clear that as regards the

transfer of interests in land a court of the situs, in accordance with the conflict rules of the *lex rei sitae*, will usually apply the domestic rules of the *lex rei sitae*, and a court other than that of the situs will apply whatever domestic rules a court of the situs would apply (o). Whether the case fell within the general rule is not quite so clear. The court seems to have assumed that the case was simply a matter of capacity to transfer land governed by the domestic rule of the *lex rei sitae* within the general rule (p), and did not avail itself of the opportunity to discuss the primary purpose and possible territorial limitation of each of the two sets of legislative provisions in question. The purpose of the Quebec provisions is to enforce a policy of family law and they are presumably intended to apply to all married people domiciled in Quebec without regard to the law of the country in which they may purport to transfer property or contract (q). These provisions would clearly invalidate the transfer in *Landreau v. Lachapelle* unless the Ontario provisions have an overriding effect, as regards the transfer of Ontario land, and that depends on the true construction of the Ontario provisions. The provision of the Married Women's Property Act might be construed as intended to enlarge the capacity of married women domiciled in Ontario and no others. A similar construction of the Land Titles Act would be excluded as against a transferee for value from the husband after he had been registered as sole owner, but would not be excluded as between the husband and the wife or her executor. These matters would seem to constitute the real problem presented by *Landreau v. Lachapelle*, but they were not discussed by the court (r).

The case of *Hutchison v. Ross* (s) is not one relating to land, but it should be mentioned here because it involves another

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(o) See chapter 22, § 3.

(p) Cf. Story, Conflict of Laws, § § 184, 431; Conflict of Laws Restatement, § 216; Beale, Conflict of Laws, vol. 1 (1935) 941; Dicey, Conflict of Laws (5th ed. 1932) 583, 584; all quoted in the judgment.

(q) Cf. Johnson, Conflict of Laws, vol. 1 (1933) 405 ff. and appendix, p. 449, vol. 3 (1937) 408.

(r) Cf. *Smith v. Ingram* (1902), 130 N.C. 100, 40 S.E. 984, and *Proctor v. Frost* (1938), 89 N.H. 304, 197 Atl. 813, discussed by Cook, Logical and Legal Bases of the Conflict of Laws (1942) 271, 274. The latter case is in accord with the approach advocated in the text, while the former case is in accord with that adopted by the court in *Landreau v. Lachapelle*.

(s) (1933), 262 N.Y. 381, 187 N.E. 65, 87 A.L.R. 1007, Lorenzen, Cases on the Conflict of Laws (5th ed. 1946) 894, Court of Appeals

phase of the conflict between the Quebec statutory provisions above mentioned and the *lex rei sitae*. A marriage was celebrated in Ontario in 1902 between a man domiciled in Quebec and a woman domiciled in Ontario, and the parties were from that time continuously domiciled in Quebec. By their ante-nuptial contract they provided that "there shall be no community of property between the consorts notwithstanding the common law of the province of Quebec, in which they intend to reside, and by the laws of which they wish to be governed." In 1916 the husband, having inherited an estate of about ten million dollars from his father, and desiring to make a settlement of one million dollars for the benefit of his wife and children in place of the covenant for a settlement of \$125,000 included in the ante-nuptial contract, transferred money and movable securities (most of them being already in New York, having been there before the father's death, and the rest being forwarded from Montreal) to a trustee in New York. A trust settlement was prepared in New York form and was signed by the trustee in New York and by the husband and wife before the American Consul General in Montreal. In 1926 the husband, having become insolvent, and having procured by misrepresentation his wife's signature to a revocation of the settlement, brought two actions in New York, one for the revocation of the settlement pursuant to his wife's consent, and the other for the annulment of the settlement *ab initio* on the ground that by the law of Quebec the parties were incapable of altering the terms of their ante-nuptial contract or conferring benefits *inter vivos* upon each other. The Court of Appeals of New York, affirming by a majority of five to two the decision of the Appellate Division, dismissed the actions, and held that the validity of the settlement was governed by New York law, that being the law of the situs of the trust *res* and being the law by which the parties intended the settlement to be governed. It was held that a New York court had no jurisdiction to adjudicate upon the validity of the renunciation (contained in the settlement) by the wife of the benefits of the covenants of the ante-nuptial contract and that this question, which

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of N.Y., affirming *Hutchison v. Ross* (1931), 233 App. Div. 516 (253 N.Y. Supp. 889), and *Ross v. Ross* (1931), 233 App. Div. 626 (253 N.Y. Supp. 871). *Hutchison v. Ross* is cited with approval by Beale, *Conflict of Laws*, vol. 2 (1935) 985, 1019, but the judgment of the Appellate Division in *Ross v. Ross* is severely criticized by Johnson, *Conflict of Laws*, vol. 1 (1933) 449 (appendix); cf. *ibid.*, 419 ff.

would be governed by Quebec law, must be left for a Quebec court to decide (*t*).

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(*t*) It being conceded that the renunciation would be invalid by Quebec law, the result, as pointed out in the dissenting judgment, would be that the wife would enjoy in Quebec the benefits of the covenant for the settlement of \$125,000 contained in the ante-nuptial contract and in New York the benefits of the settlement of one million dollars, whereas it was intended by the parties that the \$125,000 should be part of the total of one million dollars.

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## CHAPTER XXXII.

### MOVABLES AND INTANGIBLES: ADMINISTRATION AND SUCCESSION.

The foregoing chapter heading may serve to indicate a transition from a series of chapters in most of which stress has been laid on interests in land to some chapters in which stress is laid on interests in movables. The chapter heading may also be regarded as a sort of memorial of a suppressed article (*a*), sufficiently reproduced here by cross-references to other chapters in which various topics are discussed.

The topics of administration of estates of deceased persons and succession on death have been discussed fully in chapter 22, with special regard to immovables (land), but also necessarily involving some discussion of movables and intangibles. As to all kinds of assets the jurisdiction with regard to administration, in the sense of the management of the estate of a deceased person (getting in the assets, payment of creditors' claims and distribution of the surplus) is limited, at least in Anglo-American countries, to assets situated (either actually or in contemplation of law) within the country of administration, and the appointment of a personal representative and the control of his conduct is vested solely in the courts of the country of the situs. As pointed out in chapter 22, the course of administration is, generally speaking, governed by the domestic rules of the law of the forum (identical in this case with the law of the situs), and it is only in the last stage of the administration, that is, in the distribution of the surplus, that resort must be had to the law of succession appropriate to particular assets.

It is commonly stated that succession to movables is governed by the law of the domicile of the deceased person at the time of his death. The ambiguities inherent in the statement that a given question is "governed" by the "law" of a particular country have been discussed in chapter 2, and the

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(a) *Administration and Succession in the Conflict of Laws*, published (1934), 12 *Canadian Bar Review* 67-79, 125-141.

related problem of the *renvoi*, with special regard to succession to movables, has been discussed in chapters 7, 8 and 9.

It is important to distinguish between things and interests in things. Interests in things are necessarily intangible and strictly speaking have no situs, and therefore are neither movable nor immovable. On the other hand, things, in which one may have interests, may be (1) tangible things (which may be either (a) movable or (b) immovable) or (2) intangible things. Interests in things are subdivided in Anglo-American law into real property and personal property, but this subdivision does not coincide with the distinction between interests in immovables and interests in movables. These matters have been discussed in chapter 21. As pointed out in chapter 22, conflict rules relating to succession are not, generally speaking, based upon the distinction between real property and personal property. The general rule is that succession to any interest in land is governed by the *lex rei sitae*, whether that interest is classified as realty or personalty, and for convenience the same general rule applies to interests in some things, such as title deeds or the keys of a house, which are in themselves movable, not being physically attached to or incorporated in the land.

The general rule, as regards movables, is that succession is governed by the *lex domicilii*. The rule, as commonly expressed, mentions only movables, but there is no doubt that it is intended to include also interests in intangible things generally, as, for example, interests in shares and bonds, provided that such interests do not constitute interests in land, as, for example, in the case of a bond creating a charge or mortgage on land. Interests in intangibles should be expressly included in the rule, that is, that the law of the domicile governs succession to interests in movable and intangible things, so as to avoid the artificial classification of intangibles as movables. Having said so much, I must admit that the inveterate custom of speaking of succession to "movables" in an inclusive sense will be difficult to avoid or eradicate. Various kinds of intangibles have been discussed in chapter 20, with special regard to their legal situs and their transfer *inter vivos*.

The two general rules, that succession to interests in immovables (land) and succession to interests in movables (and intangibles) are respectively governed by the *lex rei sitae* and the *lex domicilii* without regard to the distinction between real

property and personal property, are subject to one important exception by reason of ss. 1 and 2 of Lord Kingsdown's Act. This statute is discussed in chapters 23, 24 and 25. As regards the formal validity of a will, the statute applies to movables and intangibles as well as to those interests in land that are classified in English law as personal property, and is included in the discussion of the formal validity of wills in chapter 22.

Questions of the intrinsic validity of a will discussed in chapter 22 include limitations on the disposing power of a testator, both as regards land and as regards movables. A limitation of this kind occurs in cases involving movables more frequently than in cases involving land. A particular example of such a limitation is to be found in Anglo-American countries in modern statutes discussed in chapter 36.

Other matters relating to succession to movables which are for convenience discussd in chapter 22, along with succession to land, are questions of the construction of a will (including s. 3 of Lord Kingsdown's Act), and the doctrine of election.

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## CHAPTER XXXIII.

### POSTPONEMENT OF DISTRIBUTION; CREATION AND ADMINISTRATION OF TRUSTS\*

*In re Wilks, Keefer v. Wilks* (a) is a neat case on characterization in the conflict of laws. E. L. Wilks died domiciled in Ontario, owning property in England, France, Canada and the United States, and leaving him surviving his widow M. R. Wilks (the first defendant) and three children (the infant defendants). E. L. Wilks having died intestate as to the assets situated in England, which consisted of shares in a private company, the plaintiff and M. R. Wilks obtained a grant of letters of administration in England.

By the law of Ontario, which, as being the *lex domicilii* of the *de cuius* governed the succession to his movables (b), the children became absolutely entitled to two-thirds of the shares, whereas if E. L. Wilks had been domiciled in England at the time of his death the children would have been entitled contingently on their attaining majority or marrying. It was not disputed that to the extent just stated the question of the children's interest in the shares was a matter of succession to movables, which was consequently governed by the law of the domicile of E. L. Wilks at the time of his death.

It happened, however, that the shares were not readily saleable, and the question arose whether the administrators might lawfully postpone the sale of the shares and hold them in the meantime as trustees for the children, in accordance with the [English] Administration of Estates Act, 1925, or whether they were bound to sell the shares and pay the proceeds into court, in accordance with the [Ontario] Devolution of Estates Act. It being the rule of English conflict of laws that administration of the assets of a deceased person, as distinguished

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\*This chapter reproduces a comment published (1935), 13 Canadian Bar Review 749-750, and includes a postscript on the creation and administration of trusts in the conflict of laws.

(a) [1935] Ch. 645.

(b) In fact in the present case intangibles, not movables, but conventionally included in the conflict rule that succession to movables is governed by the law of the domicile: see chapter 32.

from succession, is governed by the *lex situs* of the assets, the answer to the main question depended on the answer to the further question, when does administration end and succession begin, or, in other words, is the main question to be characterized as a matter of administration or as a matter of succession? In favour of the applicability of the Ontario statute it might be said that when debts and administration expenses have been paid, and a net residue has been ascertained, the administration is at an end, and the *lex domicilii*, as the law governing succession to movables, becomes applicable. It was, however, decided by Farwell J. that the power to postpone given by the English statute is a power given to administrators, which is exercisable over assets situate in England so long as the administrators cannot get a good discharge from the beneficiaries. This conclusion was reached upon the construction of the English statute, by which the judge was of course bound, and which, in at least one section, seemed to make provision for the exercise of a power to appoint trustees as to English assets to which infants might be entitled under the law of their father's foreign domicile. The case is, however, of general interest because it is near the border line between administration and succession, and like the earlier case of *In re Lorillard* (c), it indicates that a local administrator must act in accordance with the *lex rei sitae*, and is subject only to the control of the courts of the situs, and that consequently he may be under no obligation, even when a net residue is ascertained, to deliver or remit the assets to the domiciliary administrator (d).

*Postscript: Creation and Administration of Trusts.*

In the *Wilks* case, the subject of the foregoing comment, the result was that by the domestic rules of the law of the forum a trust was created for the infant beneficiaries, and the period of administration under that law was extended, and the distribution of the assets under the proper law of succession was correspondingly postponed. Such a trust, which might arise either in the case of administration on an intestacy or in the case of administration by an executor pursuant to the probate of a will, is analogous to, or a part of, the general trust for the due administration and distribution upon which the executor

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(c) [1922] 2 Ch. 638. As to this case, see chapter 35.

(d) Cf. chapter 22, § 1.

or administrator gets in and holds the assets of the estate of a deceased person under the domestic law of the country of the particular local administration of the assets situated within that country (e). A trust of the kind just mentioned is of course different from a testamentary trust, that is, a trust created by the will of the deceased owner, under which the executors, in the character of trustee, or some other trustee, holds the assets or part of them in trust after the administration of the estate in the ordinary sense comes to an end. The question of the validity of a testamentary trust would appear to be indistinguishable from the question of the validity of the will which creates the trust, a question of succession on death, the governing law being the *lex rei sitae* as to interests in land and the *lex domicilii* as to interests in movables and intangibles, subject to the modifications discussed in other chapters (f).

The valid creation of a testamentary trust being assumed, including the vesting of the title to or the control of the assets in the trustee, a different question is what law governs the administration of the trust. It would seem that whatever be the nature of the trust *res* and whatever be the law governing the creation of the trust, the law governing the administration should, as a general rule, be the *lex rei sitae*, including whatever effect that law gives to the expressed or implied intention of the testator. This law would also be the *lex fori* as regards the control which a court of the situs may exercise over the administration.

Relatively little has been written about testamentary trusts in the conflict of laws. Beale (g) discusses them somewhat briefly. Land (h) discusses them more fully, but expressly limits his discussion to conflicts between states of the United States (i). The English cases are scanty, and are discussed by Croucher (j). Two of them, *Attorney-General v. Campbell*

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(e) See chapter 22, § 1.

(f) See chapter 22, § 2, and chapter 32, and the cross-references there given.

(g) 2 Beale, *Conflict of Laws* (1935) 1022-1023, with reference to trusts of movables; cf. *Conflict of Laws Restatement*, §§ 295, 298.

(h) *Trusts in the Conflict of Laws* (1940).

(i) As to the special treatment of conflict problems arising within the United States, see chapter 11, § 2.

(j) *Trusts of Movables in Private International Law* (1940), 4 *Modern L. Rev.* 111.

(*k*) and *In re Agamoor's Trusts* (*l*), support the view that the creation of a trust of movables is governed by the *lex domicilii*, and the administration by the *lex rei sitae*. The third, *Canterbury v. Wyburn* (*m*), is not inconsistent with that view.

Questions of the conflict of laws in relation to trusts declared *inter vivos* have arisen frequently in the United States, where they are sometimes called "living trusts." Broadly speaking, the creation and the administration of the trust should be governed by the law of the situs of the trust res, in accordance with the general rule that the creation and transfer *inter vivos* of interests (legal or equitable) in things of all kinds is governed by the *lex rei sitae* (*n*), subject to whatever effect may by that law be given to the intention of the settlor. The foregoing statement may seem, however, to be too simplified in the light of the varied situations which have occurred in American cases. For the present I can do little more than refer to what has been already written on the topic.

The English cases discussed by Croucher (*o*) all relate to marriage contracts (or settlements), and, as he says, it does not follow that "the principles to be deduced from them apply to ordinary trusts." In English conflict of laws marriage contracts have usually been treated like contracts in general, governed by the proper law of the contract, this proper law being ascertained on the principles discussed in earlier chapters (*p*), regard being had to the intention of the parties and the substantial connection of the contract with a particular country. Reservations must be made, however, as regards capacity to make a marriage contract (*q*). In the case of *In re Bankes* (*r*) a marriage contract was made between a woman domiciled in England and a man domiciled in Italy, in English form. The matrimonial domicile was Italian. The contract included a covenant by the woman to settle after acquired property, valid by English law, invalid by Italian law, the subject matter

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(*k*) (1872), L.R. 5 H.L. 524.

(*l*) (1895), 64 L.J. Ch. 521.

(*m*) [1895] A.C. 89.

(*n*) See chapters 19, 20 and 30. Intangible things, having no actual situs, are regarded as having a legal situs for various purposes, as discussed in chapter 20.

(*o*) *Op. cit.*, 4 Modern L. Rev. 111, at pp. 117 ff.

(*p*) See chapter 14, § 9, and chapter 16, § 3.

(*q*) See chapter 31, § 2.

(*r*) [1902] 2 Ch. 333.

being situated in England in the sense that it consisted of the woman's interest as legatee under the wills of her father and mother. An English court applied English law. In the case of *In re Fitzgerald* (*s*) an English court applied Scottish law to a marriage contract made between a woman domiciled in Scotland and a man domiciled in England relating to Scottish heritable bonds (*t*) and a relatively small sum of money. The contract was in Scottish form. Of the trustees five were English, one was Scottish. The contract conferred on the man an alimentary life interest, unknown to English law, upon which he, residing in England, created a charge. The court held that the charge was invalid because the life interest construed by Scottish law did not include the power to create the charge. In the case of *In re Hewitt's Settlement* (*u*) an English court refused to appoint the Public Trustee in England as sole trustee of a marriage contract made between a man domiciled in Scotland and a woman domiciled in England on the ground that the proper law of the contract was Scottish law. In *Duke of Marlborough v. Attorney-General* (*v*) the Court of Appeal held that succession duty was payable in England in respect of the settled funds under a marriage contract on the ground that the proper law of the contract was English law (*w*). The contract was made in New York between a woman there domiciled and a man domiciled in England, the subject matter being shares in an American railway company, and the intended matrimonial domicile of the parties being English. There were also some other facts which, in the opinion of the court, indicated that the parties intended the contract to be governed by English law.

Much valuable material has been published in the United States with regard to trusts *inter vivos* in the conflict of laws. The topic has been subdivided under the headings of creation and administration, and these headings have been further subdivided. As regards trusts of movables and intangibles, many different connecting factors or points of contact have been dis-

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(*s*) [1904] 1 Ch. 573.

(*t*) Creating a charge on land situated in Scotland. See chapter 21, § 2.

(*u*) [1915] 1 Ch. 228.

(*v*) [1945] Ch. 78.

(*w*) See criticism of the judgment by Morris (1945), 61 L.Q. Rev. 223. The case and the criticism are mentioned in connection with capacity to contract, in chapter 31, § 2, note (*u*).

cussed, in addition to the situs of the trust *res* and the domicile of the parties. Some of the items of this published material are here mentioned in chronological order, beginning with an article by Cavers (*x*), described as "brilliant" by Beale (*y*) in a short but significant article. In order of time I mention also the case of *Hutchison v. Ross* (*z*), which is discussed at the end of chapter 31, § 2, because it involved a conflict between the *lex rei sitae* (New York) and the law of the matrimonial domicile of the parties (Quebec), they being incapable by that law of making the contract in question. Then followed the Conflict of Laws Restatement (*a*), Beale's Treatise (*b*), an article by Swabenland (*c*), and a book by Land (*d*).

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(*x*) *Trusts Inter Vivos and the Conflict of Laws* (1930), 44 Harv. L. Rev. 161.

(*y*) *Living Trusts of Movables in the Conflict of Laws* (1932), 45 Harv. L. Rev. 969.

(*z*) (1933), 262 N.Y. 381, 187 N.E. 65, 87 A.L.R. 1007, Lorenzen, *Cases on the Conflict of Laws* (5th ed. 1946) 894.

(*a*) (1934), § 233, comment *a*, § 239, comment *c*, and §§ 241, 242, 243, 294, 296, 297, 299.

(*b*) 2 *Conflict of Laws* (1935) 962 ff., 1018 ff.

(*c*) *Conflict of Laws in Administration of Express Trusts of Personal Property* (1936), 45 Yale L.J. 438.

(*d*) *Trusts in the Conflict of Laws* (1940).

## CHAPTER XXXIV.

### DONATIO MORTIS CAUSA: GIFT INTER VIVOS OR TESTAMENTARY\*

The case of *In re Craven's Estate, Lloyds Bank v. Cockburn* (a), decided by Farwell J. in an English administration and involving an alleged *donatio mortis causa* made in Monaco of certain shares and money situated in Monaco, raises interesting questions as to the characterization of a *donatio mortis causa* in the conflict of laws and as to the scope of administration of the estate of a deceased person.

The testatrix, domiciled in England, gave to her son a power of attorney with respect to shares and money held for her by a bank in Monaco. On July 15, 1935, having in mind an operation which might prove fatal, she told her son to get the shares and the bank balance into his own name, as she wanted him to have them in case anything happened to her. She died on the 20th and in the meantime her son had written to the bank instructing it to transfer to him all securities and any cash balance standing in his mother's name. The bank acted on the son's instructions. The question which Farwell J. had to decide was in effect whether the shares and cash balance formed part of the widow's estate or whether they had been validly transferred in her lifetime to her son. Farwell J. held that the son was entitled to the shares and money on the ground that the question whether there had been a valid *donatio mortis causa* must be determined by English law, and that the only question to be determined by the law of Monaco was whether the acts relied on as constituting a parting with the dominion over the shares and money was effective for that purpose. It is submitted that the method of approach to the problem was wrong, and that this method of approach led to a wrong result.

The fact that the result was wrong is obscured in the reports of the case in the Law Reports and in the All England Law

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\*This chapter reproduces a comment published (1938), 16 Canadian Bar Review 145-148.

(a) [1937] Ch. 423, [1937] 3 All E.R. 33. A better report is given in (1937), 53 Times L.R. 694.

Reports because the judge's statement with regard to the evidence of the law of Monaco is omitted in both reports. On the other hand, the report in the Times Law Reports furnishes us with the material which is missing in the other reports. It appears from the evidence of the expert witness (b) that according to the French Civil Code, in force in Monaco, a *donatio mortis causa* as defined by English law is unknown to the law of Monaco, and furthermore, that the law of Monaco would not in any other way (as, for example, by way of a trust) give effect as a transfer *inter vivos* to the transaction in question in the *Craven* case, that is, a transaction which was admittedly conditional on the donor's death.

In the case of *In re Korvine's Trusts* (c) the court had to adjudicate on the validity of a *donatio mortis causa* alleged to have been made by a person domiciled in Russia of movables situated in England, and the court applied the law of England (the *lex rei sitae*). The problem of the conflict of laws was simply whether, according to the law of England, a *donatio mortis causa*, which in some respects resembles a gift *inter vivos* and in some respects resembles a testamentary gift, should be characterized as being analogous to the one so as to be governed by the *lex rei sitae*, or as being analogous to the other so as to be governed by the *lex domicilii*. Whether it is more nearly analogous to the one rather than to the other is a nice question which was answered in favour of gift *inter vivos* in the *Korvine* case (d). It happened in that case that the *lex rei sitae* was also the *lex fori*, so that it was obvious that the nature of the transaction in question had to be determined by the law of England, and that when it had been decided that the transaction was such as to confer a proprietary interest upon the donee and to prevent the subject matter from forming part of the estate of the donor, it became unnecessary, as regards that transaction, to refer to the *lex domicilii*.

In the *Craven* case the situation was different. The testatrix was domiciled in England at the time of her death and the forum was English, but the assets in question were situated in Monaco at the time of the transaction in question. Resort to the foreign *lex rei sitae* was therefore necessary for the pur-

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(b) 53 Times L.R. 694, at p. 697.

(c) [1921] 1 Ch. 343.

(d) The question was answered in the same way in the well reasoned judgment in *Emery v. Clough* (1885), 63 N.H. 552; cf. 2 Beale, Conflict of Laws (1935) 981.

pose of the characterization of the transaction, because if by that law the son of the testatrix acquired a proprietary interest in the lifetime of the testatrix, effect should be given to that interest in England (*e*). It happened that if the transaction were governed by English law it would have been a valid *donatio mortis causa*, but this is beside the point; and it is submitted that there is no justification for saying that any part of the transaction under which the son claimed was governed by English law. When the son claimed that he was entitled under a transaction which took place in the lifetime of the testatrix with regard to assets then situated in Monaco, the court ought to have consulted the law of Monaco, as proved, for the purpose of ascertaining whether any transaction (whether by way of *donatio mortis causa* or otherwise) had taken place which by that law had the effect of a transfer *inter vivos* or which by that law was sufficiently analogous to a transfer *inter vivos* to be regarded by an English court as coming within the rule that the *lex rei sitae* governs the transfer of property or the creation of proprietary rights. If by that law the son in the lifetime of the testatrix acquired the property in the assets, the English court would of course have held his claim to be valid, and consequently as regards those assets no question of succession (governed by the *lex domicilii*) would arise. The expert witness, however, not only did not say that the son acquired the property in the assets, but he also negated any interest which, although possibly falling short of being, from the point of view of English law, a strictly proprietary interest, might be regarded as analogous to a proprietary interest, legal or equitable, in the assets. Trust and *donatio mortis causa* were expressly negated. It is submitted that in these circumstances Farwell J. ought to have disallowed the son's claim and held that the assets in question were part of the estate of the testatrix, distributable in accordance with her will.

Hellendall, commenting on the case (*f*), quotes and criticizes the passage from the judgment of Farwell J. (*g*) in which he says that the question to be decided

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(*e*) See chapter 4, § 7, and chapters 19 and 20.

(*f*) (1938), 16 Can. Bar Rev. 143. The *Craven* case was the subject of further discussion by the same author in *The Characterization of Proprietary Rights to Tangible Movables in the Conflict of Laws* (1941), 15 Tulane L. Rev. 374. The author finds fault at pp. 378 ff., with my theory that the English court should consult

is a question of administration in the sense that the executors are bound to get in the whole of the estate of their testatrix and as soon as they found that apparently part of her estate consisted of these shares and this money they were bound to endeavour to get it in and the question whether or not they can rightly claim it from the person who was in possession at the death is one to some extent, at any rate, of administration and in my judgment must be decided by English law, subject only to this; it being necessary according to English law that there should be an effective parting with dominion over the property, that which is said to constitute the parting with dominion must be an act which would be effective in the place where the property is situate according to the law of that place. As I understand the evidence there is nothing whatever which prevents what was done being a sufficient parting with dominion.

I agree with Hellendall in submitting that there was no justification for limiting the reference to the law of Monaco to the single question whether there was "an effective parting with dominion over the property." Resort should have been had to that law with regard to the whole question whether the alleged gift was valid. On the evidence as to that law it would appear that no valid gift was made.

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the *lex rei sitae* for the purpose of ascertaining whether the son acquired a proprietary interest *inter vivos*. As I have attempted in earlier chapters, mentioned in note (e), to justify my theory, any further discussion by me here would be mere repetition.

(g) [1937] Ch. 423, at pp. 429, 430.

## CHAPTER XXXV.

### INSURANCE MONEY: ADMINISTRATION AND SUCCESSION\*

Some interesting questions as to administration and succession are suggested by the case of *Public Trustee of New Zealand v. Lyon (a)*, decided by the Privy Council on appeal from the Court of Appeal of New Zealand.

It is provided by s. 65, sub-s. 2, of the Life Insurance Act, 1908, of New Zealand as follows:

Where a policyholder dies leaving a will, the policy-moneys shall not be applied in payment of his debts or of any legacies payable under his will unless in and by his will he has by express words specially referring to such moneys declared that the same shall be so applied.

One Lyon was the holder of a policy of insurance issued to him when he was domiciled in Scotland by a Scottish company which carried on business in Scotland, and which had no office or agency in New Zealand. The policy was payable to the holder, his executors, administrators and assigns, on his surviving the 28th February, 1942, or on his death at an earlier date. He died on the 8th August, 1932, domiciled in New Zealand, having made a will by which he gave all policies of insurance to his wife and certain of his children, or such of them as should survive him, and which contained no declaration that insurance money should be applied in payment of his debts. Administration was granted in New Zealand to the Public Trustee. There was no grant of representation by any court in Scotland and therefore there was no administration of the estate in Scotland. The Scottish company, pursuant to s. 19 of the Revenue Act, 1889, of the United Kingdom, paid the insurance money to the Public Trustee of New Zealand (b). The proceeds of the policy thus transmitted to New

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\*This chapter reproduces a comment published (1936), 14 Canadian Bar Review 509-514.

(a) [1936] A.C. 166, affirming *In re Lyon, Lyon v. Public Trustee*, [1934] N.Z.L.R. 296.

(b) Section 11 of the Revenue Act, 1884, provides: "Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a Court in the United Kingdom by probate or letters of

Zealand were, said Kennedy J. in the Court of Appeal, "like the movables of a deceased person reduced into the possession of the New Zealand administrator as such and brought into New Zealand before any person in Scotland obtained any valid title by the *lex situs* or reduced them into possession (see Dicey's Conflict of Laws, 5th ed. 383), and the insurance money became assets to be administered in the New Zealand administration" (c).

The estate was insolvent, and the administrator took out an originating summons in New Zealand for the determination of the question whether s. 65 of the New Zealand statute applied to the policy in question so as to render the insurance money not available to creditors, the summons being served on the widow, representing herself and the children, and on one Page, representing himself and all other creditors of the testator. The Court of Appeal of New Zealand, by a majority judgment, reversing the decision of Ostler J., held that the money was not available for creditors. On the Public Trustee's appeal, the Privy Council affirmed the judgment of the Court of Appeal, finding, after an examination of various provisions of the statute, that there was nothing in the statute which expressly or impliedly limited its application to a policy issued by a company carrying on business in New Zealand or having an office or agency there; and Lord Thankerton quoted with approval (d) the following passage from the judgment of Kennedy J. (e):

administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom." This was subject to a proviso which was amended by the Revenue Act, 1889, s. 19, to read as follows: "Provided that where a policy of life assurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy." See the discussion of these provisions in *Haas v. Atlas Assurance Co. Ltd.*, [1913] 2 K.B. 209.

(c) [1934] N.Z.L.R. 296, at p. 312. Kennedy J. added: "The facts in this case are, it thus appears, different from those disclosed in *Cook v. Gregson* (1854), 2 Drew. 286. There the administrator had in England assets which he had collected in Ireland under an Irish grant. As the administrator had a two-fold character—namely, that of an English administrator and also that of an Irish administrator—he was held bound to administer the Irish assets as an Irish administrator."

(d) [1936] A.C. 166, at p. 176.

(e) [1934] N.Z.L.R. 296, at p. 314.

The object of s. 65 plainly is to encourage provision by way of insurance for the person insured and his wife or children, even to the extent of freeing the proceeds of an insurance policy from the claims of creditors. Individuals, and not policies, are the objects of the solicitude of the Legislature. If that be the true view, as I think it is, then there does not appear any reason why protection should apply for the benefit of a policyholder, his wife or children, in respect of a policy which has been issued in New Zealand or on a proposal made in New Zealand, but should not apply for the benefit of the same person or persons in respect of a policy issued abroad on a proposal there made.

Lord Thankerton concluded his reasons for judgment as follows (f) :

The appellant is in this difficulty; if the provisions of s. 65 merely bar the [creditors'] right of recovery in New Zealand, such bar will operate to prevent their recovery in the New Zealand administration in course of which the present question arises. If, on the other hand, s. 65 destroys the right or title of the New Zealand creditors as against the policy moneys which form part of the estate of a person domiciled in New Zealand then, even if there had been a Scottish administration, the New Zealand creditors could not have proved in the Scottish administration any claim of debt against the policy moneys.

The dilemma stated in the passage just quoted is of course dependent upon the facts of the case, and especially upon the fact that the claims of New Zealand creditors only were in question, and as regards such creditors, the passage omits in the first sentence the contingency mentioned in the second sentence, namely, "if there had been a Scottish administration."

If there had been a Scottish administration, the question of the construction of the New Zealand statute and its applicability to New Zealand creditors as well as other creditors claiming in the Scottish administration would have been a question for a Scottish court (g) and not a question for a New Zealand court or for the Privy Council acting in the character of the supreme appellate court of New Zealand; and Lord Thankerton's statement of what a Scottish court would decide as to the claim of New Zealand creditors is interesting from the point of view of the conflict of laws. Owing to the fact that the question for decision was only as to the effect of a New Zealand statute in a New Zealand administration of the estate of a person who was domiciled in New Zealand, the whole case is suggestive, rather than decisive, of questions of the conflict of laws. It was immaterial to the decision whether the court construed the statute as one which merely barred the remedy

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(f) [1936] A.C. 166, at p. 177.

(g) See chapter 22, § 1.

of creditors or one which destroyed the right or title of creditors, or, whether the court characterized the statute as being one relating to administration only, and therefore limited in its application to a New Zealand administration (governed by the law of the forum of administration or, in other words, the *lex situs* of the assets included in that administration), or as being a statute relating to succession, and therefore (by reason of the New Zealand domicile of the testator) applicable to all life insurance moneys, without regard to the situs of the assets or the place of administration. If there had been a Scottish administration, these questions would have been material. Lord Thankerton expressly says that if the New Zealand statute destroyed the right or title of the New Zealand creditors, they could not claim in a Scottish administration, whereas, impliedly, if the statute merely barred the remedy, such creditors might claim in Scotland, though not in New Zealand. On the latter construction of the statute, Scottish creditors might claim in Scotland, but not in New Zealand. On the former construction of the statute, the Scottish creditors would not be entitled to claim in New Zealand, but would they be entitled to claim in Scotland?

In the case of *In re Lorillard* (h) the testator died domiciled in New York, leaving assets and creditors in England and in New York. The claims of certain American creditors were barred by lapse of time in England, but not in New York. In the New York administration there was a deficiency of assets, whereas in the English administration there was a surplus. Hence the strange result that by reason of the application in each forum of the *lex fori* relating to limitation of personal actions, the English court distributed in accordance with the *lex domicilii* the beneficial interest in a surplus, notwithstanding that this surplus did not exist by the *lex domicilii* in the sense that if the English administrator had paid the surplus to the New York administrator for distribution, the latter would probably have paid the American creditors, whose claims were valid by New York law (*lex fori*) and there would have been no surplus to which the New York law of succession (*lex domicilii*) would have been applicable.

The case of *Public Trustee of New Zealand v. Lyon* suggests the converse situation, namely, that in a Scottish administration the claims of creditors might be allowed against the insurance

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(h) [1922] 2 Ch. 638.

money, so as to leave no surplus to which the law of New Zealand (*lex domicilii*) would apply. This result would be clear if the Scottish court construed the New Zealand statute as merely barring the remedy of creditors, that is, as being part of the procedural law of the forum. Both Scottish and New Zealand creditors would be entitled to claim in the Scottish administration, but not in the New Zealand administration. If, as Lord Thankerton suggests might be done, the statute were construed as destroying the right or title of creditors, a Scottish court might say that it destroyed the rights or title of New Zealand creditors only. If the Scottish court construed the statute as being a statute relating to succession to movables, which Lord Thankerton does not in terms suggest as a possibility, then the statute should govern the succession everywhere, and even in the Scottish administration the money should be paid to the beneficiaries under the *lex domicilii* and should not be available even for Scottish creditors.

The statute in question in *Public Trustee of New Zealand v. Lyon* invites comparison with s. 145, sub-s. 1, of the (Ontario) Insurance Act, R.S.O. 1927, c. 222 (i), which reads in part as follows:

Where the insured . . . designates as beneficiary or beneficiaries a member or members of the class of preferred beneficiaries [the husband, wife, children, grandchildren, father and mother of the person whose life is insured], a trust is created in favour of the designated beneficiary or beneficiaries, and . . . the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured.

By virtue of s. 146 of the same statute, notwithstanding the designation of a preferred beneficiary or beneficiaries, the insured may subsequently alter or revoke any prior designation "so as to restrict, limit, extend or transfer the benefits of the contract to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class," etc.

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(i) The same provision occurs in the statutes of all the provinces of Canada (except Quebec) by virtue of the adoption of the uniform Life Insurance Act prepared in 1923 by the Conference of Commissioners on Uniformity of Legislation in Canada. Section 145 was amended in 1935, but not so as to change the words quoted in the text. Section 145, as amended, and s. 146, now appear as ss. 156 and 157 in R.S.O. 1937, c. 256.

In *Re Baeder and Canadian Order of Chosen Friends* (j) an Ontario benevolent society issued to one Baeder, then domiciled in Ontario, a benefit certificate or policy, within the terms of the Ontario Insurance Act and governed by Ontario law. In this policy the designated beneficiaries were the three children of the insured. Baeder subsequently migrated to New York and died domiciled there. By the law of New York the beneficiaries of a policy could not be changed by the will of the insured, whereas the Ontario Insurance Act permits, and the similar statute formerly in force permitted, the insured by his will to make a new designation of beneficiaries, subject to the limitations mentioned in the provisions quoted above. Baeder made a will, valid as regards form by both Ontario and New York law, giving all his life insurance to a granddaughter. It was held that the designation of the grandchild as beneficiary was valid, because the policy, read with the statute, constituted a contract or statutory trust under which the rights of the parties, including the limited power of the insured to change the beneficiaries, were crystallized and defined at the time of the issue of the policy, or alternatively because the statute created a special power of appointment exercisable as defined in the statute, and that the rights of the parties were not affected by Baeder's acquisition of a new domicile in New York.

Impliedly the decision in the *Baeder* case negatives the characterization of the statutory provisions as being provisions relating to succession to movables, because on the basis of that characterization the proper law would be the *lex domicilii* of the testator at the time of his death. The provisions of s. 65 of the New Zealand Life Insurance Act might much more easily, it is submitted, be characterized as a part of the New Zealand law of succession to movables and therefore applicable, in New Zealand or in Scotland or elsewhere, to all the life insurance of a testator who dies domiciled in New Zealand.

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(j) (1916), 36 O.L.R. 30, 28 D.L.R. 424. Generally, as to questions of conflict of laws relating to insurance policies, cf. Beale, *Conflict of Laws* (1935), vol. 2, pp. 1210-1215, vol. 3, pp. 1488-1491.

## CHAPTER XXXVI.

### DEPENDANTS' RELIEF OR FAMILY MAINTENANCE ACTS\*

The two cases of *Mastaka v. Midland Bank Executor and Trustee Co.* (a) and *Re Testator's Family Maintenance Act, Re Elliott* (b), raise some questions with regard to the conflict of laws aspects of statutes for the relief or maintenance of a testator's dependants, for whom he has not made adequate provision by his will. The *Mastaka* case was decided in England under the Inheritance (Family Provision) Act, 1938, and the conclusion was reached that the applicant for relief must prove that the domicile of the testator at the time of his death was English. This conclusion would seem to be inevitable, inasmuch as s. 1 of the statute begins: "Where, after the commencement of this Act, a person dies domiciled in England." Laskin, in his analysis of this statute (c), draws attention to some of the situations of hardship which may arise in England by reason of the requirement that the testator must have been domiciled in England, or which may arise in Ontario by reason of the corresponding limitation occurring in the Dependants' Relief Act.

The relevant provision of the Ontario statute (d) deserves some further discussion. Section 2 begins: "Where it is made to appear to a judge of the surrogate court of the county or district in which the testator was domiciled at the time of death." This use of "domiciled" with reference to a county

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\*This chapter reproduces a comment published (1941), 19 Canadian Bar Review 539-543, and includes a postscript (1946).

(a) [1941] Ch. 192.

(b) (1941), 56 B.C.R. 178, [1941] 2 D.L.R. 71, [1941] 1 W.W.R. 356, (B.C.), Manson J.

(c) Dependants' Relief Legislation (1939), 17 Can. Bar Rev. 181; cf. Gray, Dependants' Relief Legislation (1939), 17 Can. Bar Rev. 233, drawing attention to significant differences between the Ontario statute and the New Zealand and British Columbia statutes. As to the English statute, see Dainow, Limitations on Testamentary Freedom in England (1940) 25 Cornell L.Q. 337; cf. Dainow, Restricted Testation in New Zealand, Australia and Canada (1938), 36 Michigan L. Rev. 1107.

(d) The Dependants' Relief Act, R.S.O. 1937, c. 214.

or district raises difficult questions of construction, and, on any construction, serious doubts with regard to the applicability of the statute to situations which ought to be included within its operation. If the word "domiciled" is used in the technical sense customary in the conflict of laws the reference should be to the province as a whole (e), but some analogous meaning must be attributed to the statutory clause as it stands. Strictly read, the clause would include only a testator as to whom the *factum* of residence in the county or district and the *animus manendi* with regard to the county or district are proved. Perhaps by a liberal and slightly imaginative construction the clause might be read as meaning "domiciled" in Ontario and "resident" in the county or district. In that event the clause would be open to an objection similar to that applicable to the English statute, namely, that it would exclude the case of a testator domiciled outside of Ontario, leaving immovables situated in Ontario. Alternatively, if "domiciled" were construed as "resident" (f), the clause would still be defective because no provision would be made for the case of a testator domiciled in Ontario, but having no "fixed place of abode" in any county or district in Ontario, and perhaps being temporarily resident outside of Ontario. Probate might then be granted in any county or district in which the testator "had property at the time of his death" (g), but no application could be made under the Dependents' Relief Act. On the other hand the case of testator who was domiciled outside of Ontario but resident within Ontario would not be excluded from the operation of the statute.

For reasons which will appear in the later discussion I submit that s. 2(1) of the Ontario statute should be amended so as to omit the reference to the domicile of the testator and to provide that the application may be made to a judge of the surrogate court of the county or district in which the will is

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(e) *Attorney-General for Alberta v. Cook* [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742.

(f) Cf. chapter 38, note (p), with regards to the Adoption Act of the province of Quebec: "The fact that the domicile in question is localized in a particular district of the province suggests the possibility that domicile is here used in the sense of residence."

(g) The two phrases enclosed within quotation marks occur in the Surrogate Courts Act, R.S.O. 1937, c. 106, s. 22, defining the territorial jurisdiction of the surrogate courts in respect of the granting of probate. The section further provides that in "other cases the granting of probate . . . shall belong to the surrogate court of any county."

admitted to probate or in which a foreign probate is sealed. Similarly it would seem to be desirable that the English statute should be amended so as to omit the requirement that the testator must have been domiciled in England.

The limitation of the English statute to the case of a testator domiciled in England is the subject of comment in the Annual Survey of English Law, 1938 (*h*). The commentator, Kahn-Freund, points out that it is apparently immaterial whether or to what extent the testator's estate consists of immovables or of movables, so that the restriction imposed by the statute upon a testator's disposing power "does not apply to English land forming part of the estate of a testator domiciled abroad, while it does apply to the proceeds of foreign land belonging to the estate of a domiciled Englishman." Consequently the statute may in effect make an exception to the general rule that succession to movables is governed by the *lex domicilii* and succession to immovables by the *lex rei sitae*.

The point involved in the last preceding sentence may be usefully elaborated. The suggestion is that a statute enabling a court to give to a testator's dependants a larger share of his estate than he has given them by his will is analogous to the limitations on a testator's disposing power imposed by various foreign systems of law (*i*), and therefore is to be characterized as a matter of the intrinsic validity of a will and should, in the absence of any clear indication of the intention of the legislature, apply to immovables situated within the territory of the enacting legislature without regard to the domicile of the testator, and to movables, wherever situated, belonging to the estate of a testator who died domiciled within that territory (*j*). This characterization of the question would seem to af-

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(*h*) At p. 362. There are comments on other features of the statute at pp. 84-85, 102-103, 333.

(*i*) *E.g.*, *In re Pryce*, [1911] 2 Ch. 286 (Netherlands); *In re Annesley*, [1926] Ch. 692 (France); *In re Ross*, [1930] 1 Ch. 377 (Italy). The *Annesley* and *Ross* cases are cited here merely as examples of limitations on a testator's disposing power under foreign laws, and not on account of the doctrine of the *renvoi* there in question. The latter aspect of these cases has been discussed by me in chapter 9. The limitation of French law on the disposing power of a testator is characterized in French conflict of laws, not as a matter of personal testamentary capacity governed by the testator's national law, but as a matter of succession (intrinsic validity of will) governed as regards movables by the law of the testator's domicile: see chapter 7, §§ 3 and 4.

(*j*) The statement in the text, in the form in which it appeared in an earlier article, was quoted with approval by Kerwin J. in the

ford a satisfactory solution of the problem raised by the fact that a testator may leave assets in different countries in which there are various statutory provisions or rules of law designed to protect the dependants of a testator. The English statute clearly, and the Ontario statute obscurely, limit relief to situations in which a testator was domiciled within England, or Ontario, as the case may be, and thus prevent the courts from reaching any satisfactory solution in cases in which the testator has left movables and immovables in different countries. On the other hand in some of the provinces of Canada and states of Australia and in New Zealand, the corresponding statutes contain no provisions making relief conditional on the domicile of the testator within the jurisdiction, and consequently the courts have been at liberty to apply the general principles of the conflict of laws. Thus, the New Zealand statute (*k*) has been described by judges as imposing a limitation on a testator's disposing power, though it does so, not directly, or by expressly declaring that certain classes of persons shall be entitled to certain shares, but indirectly by enabling a court to interfere with and override a testator's power of disposition on due application by or on behalf of those persons who are within the scope of the statute (*l*). "The order of the court making provision under the statute supersedes, to the extent of giving effect to such order, the disposition and provisions of the will. In a sense it is a statutory modification or qualification of the right of a testator to dispose as he pleases of his property" (*m*). Accordingly, under the general conflict rules that succession to movables is governed by the *lex domicilii* and succession to immovables by the *lex rei sitae*, New Zealand courts have applied the statute to movables and immovables situated in New Zealand of a testator domiciled there (*n*), and to immovables situated in New Zealand of a testator domiciled in Scotland, though it would not be applicable to the movables situated

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Supreme Court of Canada in *Pouliot v. Cloutier*, [1944] S.C.R. 284, [1944] 3 D.L.R. 737.

(*k*) See Brown, *Dependants' Relief Acts* (1940), 18 Can. Bar Rev. 261, 449, containing a review of the New Zealand case law, with copious quotations from the judgments of the courts.

(*l*) Cf. *Parish v. Parish*, [1924] N.Z.L.R. 307, 18 Can. Bar Rev. 451.

(*m*) *In re Roper*, [1927] N.Z.L.R. 731, 18 Can. Bar Rev. 456.

(*n*) *In re Roper*, *supra*.

in New Zealand or elsewhere of the same testator (o). Similarly, the British Columbia statute has been held to apply to immovables but not movables, situated in British Columbia of a testator domiciled in England (p), and the recent case of *Re Elliott* (q), follows the same principle, the only assets in question being movable. So, under the Saskatchewan statute, relief has been given to a widow with respect to immovables situated in Saskatchewan of a testator domiciled in Illinois (r), and in the case of a testator domiciled in Alberta, a Saskatchewan court gave the widow relief with respect to immovables situated in Saskatchewan without taking into consideration movables situated in Saskatchewan, and pointed out that her remedy with respect to immovables situated in Alberta and movables wherever situated lay in an application to an Alberta court under the Alberta statute (s).

*Postscript (1946)*

The analogy suggested in the foregoing comment between modern Dependents' Relief Acts or Family Maintenance Acts and limitations on a testator's disposing power which are a feature of many foreign systems of law is close, but not perfect. The latter usually provide that a dependant is entitled to a compulsory share or *portio legitima* of the testator's estate, while the former usually provide that a court has a discretionary power to allow to a dependant a larger share than has been given to him by the testator, not exceeding the share to which he would have been entitled on intestacy. As between two compulsory share countries, or if the forum is in a compulsory share country, the situation is relatively simple. The forum has merely to ensure that a dependant receive his compulsory share of all assets to which the domestic rules of the law of the forum apply, that is, of all land situated within its territory and of all movables wherever situated which are part of the

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(o) *In re Butchart*, [1932] N.Z.L.R. 125, 18 Can. Bar Rev. 466. 467.

(p) *In re Rattenbury Estate and Testator's Family Maintenance Act* (1936), 51 B.C.R. 321, [1936] 2 W.W.R. 554, following *In re Butchart*, *supra*.

(q) Note (b), *supra*.

(r) *Williams v. Moody Bible Institute*, [1937] 4 D.L.R. 465, [1937] 2 W.W.R. 316.

(s) *Re Ostrander Estate*, *Ostrander v. Houston* (1915), 8 Sask. L.R. 132, 8 W.W.R. 367, 30 W.L.R. 890.

estate of a testator domiciled within the territory (*t*), without considering the other assets of the estate situated in another country. On the other hand, if the forum is, in a country in which it has a discretionary power, it would seem that it should take into consideration all the assets of the estate, even those as to which succession is not governed by the law of the forum, so as to ascertain whether a dependant has been sufficiently or partially provided for out of any part of the estate, and whether, or to what extent, the discretionary power should be exercised in his favour.

In 1945 the Conference of Commissioners on Uniformity of Legislation in Canada revised and approved for recommendation to the legislatures of the provinces of Canada a model uniform statute entitled the Testators Family Maintenance Act, intended to supersede the existing diverse provincial statutes (*u*). This model uniform statute omits the requirement of the present Ontario statute (and of the English statute) that the testator must have been domiciled in Ontario (England), and therefore if it is adopted in Ontario an Ontario court will be at liberty to apply the ordinary rules of the conflict of laws relating to succession on death, as a court in New Zealand and elsewhere has been at liberty to do.

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(*t*) Or (in the case of a country in which succession to movables is governed by the national law of the testator) all movables which are part of the estate of a national of that country.

(*u*) Conference Proceedings (1945) 20, 105, 112; Canadian Bar Association Year Book (1945) 216, 301, 308.

## CHAPTER XXXVII.

### LEGITIMATION BY SUBSEQUENT MARRIAGE: STATUS AND SUCCESSION\*

The case of *In re Williams, Curator of Estates of Deceased Persons v. Williams (a)*, decided by the Supreme Court of Victoria (Full Court) raises interesting questions near the border line between status and succession.

The sequence of events was as follows. In September, 1860, Jane Williams was born, and in the following month her parents John Williams and Eliza Jones intermarried. Both of them were domiciled in England (*b*) at the time of the birth of Jane Williams and at the time of their marriage. The marriage was solemnized in Wales. Thereafter other children, including David Williams, were born in lawful wedlock. John Williams died in 1899 and his wife in 1910. In 1903 a statute of Victoria made provision for legitimation by subsequent marriage, but as it was applicable only to children born in Victoria, without regard to the domicile of the parents, it had no bearing on the present case. On January 1, 1927, the Legitimacy Act, 1926, enacted by the Parliament of the United Kingdom, became effective, and it provides (s. 1):

(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.

Jane Williams (Mrs. Roberts) died on February 16, 1932, leaving a son, Alfred John Roberts. David Williams died on May 31, 1932, a bachelor, intestate, domiciled in Victoria, and the claimants to his property, situated in Victoria, were his three surviving sisters and his brother, and Alfred John

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\*This chapter reproduces a comment published (1937), 15 Canadian Bar Review 36-40.

(a) [1936] Vict. L.R. 223.

(b) So stated in the report of *In re Williams*, although the natural inference from the terms of the declaration of legitimacy of the Welsh court, referred to below, is that the parents were domiciled in Wales.

Roberts. On June 24, 1935, the last mentioned claimant obtained from a court in Wales a declaration, pursuant to the Legitimacy Act, 1926, that his mother, Jane Williams, afterwards Roberts, was legitimated for the purpose of the Act as from the date of its commencement (January 1, 1927) by the marriage of her parents.

In an earlier Victorian case of *In the Estate of Beatty, Deceased, Trustees Executors and Agency Co. Ltd. v. Johnson (c)*, Cussen J. had decided that in order to fall within the terms "a brother's children", or "a brother's representatives", in the Statute of Distributions (in force in Victoria), the status of lawful children must have been established during the lifetime of the parents, or at all events of the father of the children. Therefore the status of a legitimate child retrospectively conferred by a statute of New York upon children born out of wedlock but whose parents subsequently intermarried, was ineffective to give the child a right to take under the Statute of Distributions in Victoria if the father, domiciled in New York, died before the enactment of the New York statute. After referring to the Victorian statute relating to legitimation as having no bearing on the case, Cussen J. added, "In any event, a modern provision of that kind should not, I think, be held to affect the meaning of children in an ancient British statute in force in Victoria by 9 Geo. IV, c. 83". He also observed that if the father had died intestate prior to the enactment of the legitimation statute, illegitimate children would not have been entitled to a share in his estate, and it would be odd that by reason of subsequent legislation they became entitled as his children to a share in his brother's estate. On substantially the same reasoning the court in *In re Williams* denied the right of Alfred John Roberts to a share in the estate of his uncle.

One member of the court suggested that the status of a person legitimated under a foreign law might be recognized "for some purposes", but held that the status should not be recognized "for the purpose of enabling him to take as one of the surviving next of kin of the intestate." This mode of stating the matter is plausible, but whether it is right is perhaps open to doubt. I should prefer to say that two questions had to be decided, namely, a question of status and a question of succession. The intestate being domiciled in Victoria at

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(c) [1919] Vict. L.R. 81.

the time of his death, and the assets being situated in Victoria, the law of Victoria was the governing law as to succession (as the *lex rei sitae* with regard to immovables and as the *lex domicilii*, with regard to movables). In the circumstances of *In re Williams* there was, as regards succession, no reference by the conflict of laws rules of the forum to the law of any other country, and therefore the classes of persons entitled to succeed had to be defined exclusively by the law of Victoria. The governing statute, at least as to movables, and as to immovable personal property, was the Statute of Distributions, by which the surviving brothers and sisters of the bachelor intestate and the children of his deceased brothers and sisters were entitled to share. The next question was whether Jane Williams, afterwards Roberts, was a sister of the intestate, that is, whether she was a legitimate child of the parents of herself and the intestate. My submission is that this should be characterized as a pure question of status and not as a question of succession, and that it should be answered by exclusive reference to the *lex domicilii* of Jane Williams' father, this being the governing law in accordance with the conflict rules of the forum. The domicile of the father was in England both at the time of the birth of Jane Williams and at the time of the subsequent marriage, so that nothing turns upon the question whether the Legitimacy Act, 1926 (*d*), made a change in English conflict of laws by providing that the domicile at the time of the marriage is alone material. It being clear that Jane Williams was legitimated by the *lex domicilii* of her father, it is submitted that her legitimacy, and consequently her son's right to share in his uncle's estate, should have been recognized in Victoria.

The *Williams* case may usefully be compared with the case of *In re Askew* (*e*) discussed in other chapters (*f*).

In the *Williams* case there is no specific discussion of succession to realty, although it is mentioned in the report that the

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(*d*) Section 8, which provides in effect that in England or Wales a child is legitimated by the subsequent marriage of his parents if his father was, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the child became legitimated by virtue of such marriage, and without regard to the domicile of the father at the time of the child's birth.

(*e*) [1930] 2 Ch. 258.

(*f*) Chapter 2, § 1(4), chapter 7, § 7, and chapter 8, § 5(3), and chapter 9.

intestate left realty as well as personalty. If we supposed the rule in *Birtwhistle v. Vardill* (g) to be in force in Victoria, the court would of course have been justified in excluding the son of Jane Williams from sharing in the realty, not because Jane was illegitimate, for she was legitimate, but because the law of succession to realty would recognize as heirs only persons born in lawful wedlock. In other words the question would not be one of status, but would be one of succession to realty and would of course be governed by the *lex rei sitae* without regard to any other law.

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(g) (1840), 7 Cl. & F. 895, 5 R.C. 748. As to this case see also chap. 4, § 8, and chapter 22, § 2(4).

## CHAPTER XXXVIII.

### STATUS OF AN ADOPTED CHILD\*

The recognition in domestic English law of the status of an adopted child began with the coming into effect on the 1st of January, 1927, of the Adoption of Children Act, 1926 (*a*), and before that date it was not clear how far, under English conflict rules, recognition would be given in England to the status of a child adopted in some other country in accordance with the law there prevailing.

The Adoption of Children Act, 1926, empowers a court in England or Wales to make an "adoption order," authorizing an applicant who is domiciled in England or Wales to adopt a child under twenty-one years of age who is a British subject resident in England or Wales. By s. 5, sub-ss. 2 and 4, it is provided as follows:

(2) An adoption order shall not deprive the adopted child of any right to or interest in property to which, but for the order, the child would have been entitled under any intestacy or disposition, whether occurring or made before or after the making of the adoption order, or confer on the adopted child any right to or interest in property as a child of the adopter, and the expressions "child," "children" and "issue" where used in any disposition whether made before or after the making of an adoption order, shall not, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child.

(4) For the purposes of this section "disposition" means any assurance of any interest in property by any instrument whether inter vivos or by will including codicil.

In view of the expressed intention of the British Parliament, in the case of a child adopted in England, to exclude an adopted child from the category of persons entitled to take under the description of child or issue of the adopter, unless a contrary intention appears, the decision of Farwell J. in *In re Luck's Settlement Trusts (b)*, afterwards reversed by the Court of

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\*This chapter reproduces a comment published (1940), 18 Canadian Bar Review 491-499. The sequel to this comment is reproduced in chapter 39.

(a) As will be noted later, in most of the provinces of Canada statutes had already been passed providing for the adoption of children.

(b) [1940] Ch. 323: see chapter 39, where the facts of the case are stated.

Appeal (c), was remarkable because of the liberal attitude there manifested with regard to an adopted child's right to take under the description of issue in an English settlement by virtue of the child's adoption under the law of the foreign domicile of the adopter.

The result of the decision of Farwell J. was to give full effect in England to the legitimation of a person by his adoption under the law of his adopter-father's domicile at the time of the adoption, without regard to the domicile of the adopter-father at the time of the child's birth, that is, without applying by analogy the former English rule (d), that in the case of legitimation by subsequent marriage the father must, at the time of the child's birth and at the time of the subsequent marriage of the father and mother, have been domiciled in a country or in countries by the domestic law of which legitimation by subsequent marriage is recognized (e).

The decision appears to be reasonable in itself, that is, apart from the provisions of the Adoption of Children Act, 1926, and, if regard is had to the fact that the operation of the statute is confined to the case of an adopter who is domiciled in England or Wales, it is also reasonable that an English court should follow by analogy a conflict rule by which the effect of adoption in another country is governed by the law of the domicile of the adopter.

Obviously the decision challenges comparison with *In re Donald* (f), in which the Supreme Court of Canada held that a child adopted under the law of the State of Washington was not within the description of children in a will made in Saskatchewan by a person domiciled in Saskatchewan, notwith-

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(c) *In re Luck's Settlement Trusts, In re Luck's Will Trusts, Walker v. Luck*, [1940] Ch. 864.

(d) The rule has of course been changed in England by the Legitimacy Act, 1926, both as regards the domestic law of England and as regards the conflict rules of English law. In either case it is now only the domicile at the time of the subsequent marriage that is material. As to the legitimation statutes of the provinces of Canada, see chapter 39.

(e) There seems to be no authority or justification for the statement of Smith J. in *In re Donald, Baldwin v. Mooney*, [1929] S.C.R. 306, [1929] 2 D.L.R. 244, that the place of birth of the child is material, or, more specifically, that the child must be "born in the domicile."

(f) See note (e), *supra*. *In re Donald* was followed in *Re Skinner* (1929), 64 O.L.R. 245, [1929] 4 D.L.R. 427, and discussed in *Culver v. Culver*, [1933] 2 D.L.R. 535, [1933] 1 W.W.R. 435 (Sask.).

standing that the adopter (a son of the testator) was at the time of the adoption domiciled in Washington (*g*) and by the law of that state the adoption had the effect of making an adopted child "to all intents and purposes, the child and legal heir of the adopter or adopters, entitled to all the rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock."

The subject of adoption of children has both domestic and conflict of laws aspects. From the purely domestic point of view the trend of modern legislation has set unequivocally in the direction of giving effect to the obvious social desirability of making provision for the adoption of children. A new status, that of an adopted child, has been created by statute. There has been less unanimity, however, on the subsidiary questions whether an adopted child should be considered within the description of a "child" in a domestic will or settlement and what an adopted child's succession rights should be. Again from the conflict point of view there is lack of unanimity on the two questions whether domestic adoption should be limited to domestic cases, as, for example on the basis of the domestic domicile of the adopter or the domestic domicile of the adopted child, and whether recognition should be granted in one country to the status of a child adopted under the law of the adopter's (or adopted child's) foreign domicile. In connection with the latter question arise also the same subsidiary questions already mentioned from the domestic point of view, namely, as to the meaning of "child" in a will or settlement and as to the succession rights of an adopted child. The question of succession rights is especially complicated from the conflict point of view because it may involve the double question of rights of succession to the estate of the natural parent as well as rights of succession to the estate of the adopted parent. It is true that in the judgment of the Supreme Court of Canada in *In re Donald* it was denied that the case involved a question of status (*h*), but it is to be observed that the testator died on April 17, 1922, and a reporter's note (*i*) draws

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(*g*) *In re Donald*, in the Court of Appeal for Saskatchewan, [1928] 4 D.L.R. 771, [1928] 3 W.W.R. 388. The fact is not specifically stated in the judgment of the Supreme Court of Canada, and was apparently regarded as immaterial in that court.

(*h*) And it was asserted that the case involved only a question as to the meaning of "child" in a will or settlement. Some observations on this question will be made later in the present comment.

(*i*) [1929] S.C.R. 306.

attention to the fact that in the province there in question, Saskatchewan, the Adoption of Children Act, 1922, came into force on May 1, 1922, that is, a few days after the death of the testator. In some of the other provinces the status of an adopted child had already received statutory sanction. Statutes providing for the adoption of children have been passed in New Brunswick (1890), Nova Scotia (1896), Alberta (1913), British Columbia (1920), Ontario (1921), Manitoba (1922), Saskatchewan (1922), Quebec (1924), and Prince Edward Island (1930).

In England, in view of the fact that the status of an adopted child has received statutory sanction in domestic English law, it appeared from the decision of Farwell J. in the *Luck* case that English courts might be more inclined than they would have formerly been to recognize a similar status created under a foreign law, and it may be that Canadian courts should adopt a more liberal attitude towards the recognition of the status of an adopted child created under a foreign law, and it is respectfully suggested that the Supreme Court of Canada might treat the *Donald* case as a special case dependent on the then condition of provincial legislation and as not being a decision which should preclude reconsideration of the court's attitude towards the recognition of adoption under a foreign law.

Apart from any possible reconsideration of the subject by the Supreme Court of Canada, the provinces might of course by appropriate legislation preclude the application of the *Donald* case to situations arising in the future. So far, however, there is not only a deplorable diversity in the various provincial statutes (*j*) but there has been little or no attempt on the part of the provincial legislatures to deal with the conflict aspects of adoption.

The Ontario legislature (*k*) has followed the principle of the English legislation in requiring that the adopter shall be domiciled and resident in the province and that the adopted child shall be resident there (thus impliedly suggesting a conflict rule by which adoption of a child elsewhere according to the law of the adopter's domicile should be recognized in Ontario), but, somewhat inconsistently, makes provision for succession

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(*j*) Cf. Johnson, *Conflict of Laws*, vol. 1 (1933) 348-354, with especial reference to succession rights; cf. *Ibid.*, vol. 3 (1937) 79-81 as to *In re Donald*.

(*k*) The Adoption Act, R.S.O. 1937, c. 218, s. 3(8) and s. 13.

rights to property in Ontario in the case of a person adopted under the law of another province where he is domiciled (thus impliedly suggesting that only the adopted child's domicile is material), as follows:

13. A person domiciled in any other province of the Dominion of Canada who has been adopted in accordance with the laws of the province where he is domiciled, shall be entitled to the same rights of succession as to property in Ontario as he would have had in the province in which he was adopted but not exceeding the right he would have had if adopted under this Act.

There is much to be said for the suggested conflict rule making the adopter's domicile the connecting factor or criterion of jurisdiction (*l*), but the matter cannot be fully considered here. Another view is that the criterion should be the domicile of the adopted child (*m*). Still another view is that a distinction should be made between legitimization by adoption by a father of his own child, governed by the law of the domicile of the adopter, on the analogy of legitimization by subsequent marriage, and adoption of a stranger, governed by the law of the domicile of the adopted child (*n*).

In Quebec it is provided (*o*) that the application for adoption shall be made by the adopter by means of a petition addressed to a judge of the Superior Court of the district in which he has his domicile (*p*), and that the petitioner who has no domicile in the province must present his petition to the Superior Court of the domicile of the child whom he proposes to adopt.

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(*l*) The rule is approved by Goodrich, *Conflict of Laws* (2nd ed. 1938) 383. See also *Re Throessel* (1910), 12 W.L.R. 683 (Alta.); *Robertson v. Ives* (1913), 15 D.L.R. 122 (P.E.I.); *In re McGillivray, Purcell v. Hendricks* (1925), 35 B.C.R. 516, [1925] 3 D.L.R. 854, [1925] 2 W.W.R. 689; *In re McAdam* (1925), 35 B.C.R. 547, [1925] 4 D.L.R. 188, [1925] 2 W.W.R. 593. On the other hand, see *Burnfield v. Burnfield* (1926), 20 Sask. L.R. 407, [1926] 2 D.L.R. 129, [1926] 1 W.W.R. 657, approved in *In re Donald*, note (e), *supra*. Notwithstanding the decision in the *Donald* case and without any reference to it, the *McAdam* case was subsequently followed in *In re Testator's Family Maintenance Act and Estate of Ramsey* (1935), 50 B.C.R. 83, [1935] 2 W.W.R. 506, holding that a child adopted by a testator under the law of the adopter's foreign domicile was entitled to the benefit of the Testator's Family Maintenance Act in British Columbia.

(*m*) Johnson, *Conflict of Laws*, vol. 1, (1933) 353; *Conflict of Laws Restatement* (1934) § 142; Beale, *Conflict of Laws* (1935), vol. 2, pp. 715-716.

(*n*) See especially Stumberg, *Conflict of Laws* (1937), 302-310.

(*o*) R.S.Q. 1925, c. 196, s. 5.

(*p*) The fact that the "domicile" in question is localized in a particular district of the province suggests the possibility that domicile is here used in the sense of residence.

In Nova Scotia it is provided (*q*) that the application be made to a county court of the district in which the adopter resides, or, if the adopter does not reside in the province, to a county court of the district in which the child resides.

In the statutes of each of the provinces of Alberta, British Columbia, Manitoba, Quebec, Saskatchewan and Prince Edward Island, provision is made for the recognition of the status of a child adopted outside the province in the sense that the child's succession rights within the province are defined, but there is no indication of the domicile either of the adopter or of the adopted child as the criterion of adoption outside the province.

The Quebec statute provides (*r*):

A person resident outside the Province who has been adopted according to the laws of the United Kingdom or any part of the British possessions other than the Province of Quebec, or of any foreign country, shall possess in this Province the same rights of succession that he would have had in the said United Kingdom or part of the British possessions or in the said foreign country, in which he was adopted.

In Alberta it is provided as follows (*s*):

A person resident out of the Province who has been adopted according to the laws of any of the provinces of Canada, shall upon proof of such adoption be entitled to the same rights of succession to property as he would have had in the province in which he was adopted, save in so far as these rights are in conflict with the provisions of this Act.

In Saskatchewan it is provided as follows (*t*):

A person resident out of the province, who has been adopted in accordance with the laws of any of the provinces of Canada, shall, upon proof of the adoption, be entitled to the same rights of succession to property as he would have had if he had been adopted in accordance with the laws of this province.

A similar provision has been enacted in Prince Edward Island (*u*):

In British Columbia it is provided as follows (*v*):

Any person adopted elsewhere than in this Province and his parent by adoption shall, in the case of intestacy, have the same rights in respect of the property of each other in the Province that they would have if the property were situate in the country where

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(*q*) R.S.N.S. 1923, c. 139, s. 1.

(*r*) R.S.Q. 1925, c. 196, s. 22, as amended by 1935, c. 67, s. 2.

(*s*) The Domestic Relations Act, 1927, s. 48.

(*t*) The Child Welfare Act, R.S.S. 1930, c. 231, s. 96.

(*u*) 1930, c. 12, s. 15.

(*v*) The Adoption Act, R.S.B.C. 1936, c. 6, s. 11.

the adoption took place, except so far as those rights are in conflict with the provisions of this Act.

In Manitoba it is provided as follows (*w*):

Where another jurisdiction has legislation respecting adoption which provides or substantially provides that upon the adoption of a child all rights and duties as between the child and the natural parents are to cease, except the right to inherit from his natural parents or kindred, and the child is thereafter to be or to be deemed to be the child of the adopting parent or parents, a child adopted in and in accordance with the law of that jurisdiction shall be deemed to have been adopted under the provision of this part.

None of the other provinces except Ontario, as already mentioned, appears to have attempted to make any provision with regard to the effect in the province of adoption outside of the province, so that this problem of the conflict of laws is left to be solved by the courts of the province on general principle, if such principle there be.

In most of the provinces, however, provision is made as to the succession rights of a child adopted in the province and as to his right to take under the description of "child," etc. It is outside the scope of this comment to discuss the diverse provisions as to succession rights (*x*), which are in general more generous to the adopted child than the English legislation, but there is practical unanimity in the provincial legislation which enables a child adopted in a particular province to take under the description of "child," etc. In particular in the province in question in *In re Donald* (*y*), Saskatchewan, it is provided as follows (*z*):

The word "child" or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument.

It is true that this provision does not overrule the actual decision in the *Donald* case, which related to a child adopted outside of the province. On the other hand, if, as already suggested, the Supreme Court of Canada should be induced to adopt a more liberal attitude towards the recognition of the status of a child adopted under a foreign law in view of the general recognition of the status of an adopted child under the domestic

(*w*) The Child Welfare Act, R.S.M. 1940, c. 32, s. 97.

(*x*) See Alta. 1927, c. 5, s. 46; R.S.B.C. 1936, c. 6, s. 10; R.S.S. 1930, c. 251, s. 94; R.S.M. 1940, c. 32, s. 96; R.S.O. 1937, c. 218, s. 6(3); R.S.Q. 1925, c. 196, s. 18; R.S.N.B. 1903, c. 112, s. 244; R.S.N.S. 1923, c. 139, s. 7; P.E.I. 1930, c. 12, ss. 13, 14.

(*y*) Note (e), *supra*.

(*z*) R.S.S. 1930, c. 231, s. 95.

legislation of the provinces, it would appear difficult for the court to maintain its adverse attitude towards the right of an adopted child to take under the description of "child" in view of the practically unanimous favourable view of the provincial legislatures in the case of domestic adoption.

Substantially the equivalent of the Saskatchewan provision is to be found in the statutes of some of the other provinces (a), but in British Columbia (b), Ontario (c), and Nova Scotia (d) the provision is limited to a disposition made by the adopting parent.

In Quebec the corresponding provision reads as follows (e):

The word "child" or any other word of the same meaning in any other act or in a deed, shall include also an adopted child unless the contrary clearly appears; but it shall not include the adopted child where it relates to a substitution in which the adopter's own children are the institutes or substitutes.

It would have been tempting at this point to discuss the so-called "plain meaning" rule, but as this comment is already long, only a few observations can be made. In applying the rule in question courts seem inclined to assume that where the word "child" is used in a will the testator's plain meaning is that only a legitimate child is referred to, unless elsewhere in the will itself there is some indication to the contrary. An extreme example is to be found in the case of *In re Paine* (f), in which a testatrix made provision for the children of her daughter, referring to her daughter by her married name, Toepfer, and yet an English judge held that as the daughter's marriage with Toepfer was invalid, the children of this marriage were not entitled to take. Again, in the case of *In re Donald* (g) the Supreme Court of Canada held that a child adopted by the testator's son was not entitled to take a gift made by the testator to the son's children. Whatever may be said for a rule excluding any one except a legitimate child from the benefit of a "statutory will" or "the will of the law"

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(a) See Alta. 1927, c. 5, s. 47; P.E.I. 1930, c. 12, s. 17.

(b) R.S.B.C. 1936, c. 6, s. 12.

(c) R.S.O. 1937, c. 218, s. 6(3).

(d) R.S.N.S. 1923, c. 139, s. 8.

(e) R.S.Q. 1925, c. 196, s. 21.

(f) [1940] Ch. 46, discussed in chapter 40, § 9.

(g) [1929] S.C.R. 306, [1929] 2 D.L.R. 244; cf. criticism of the decision by C.A.W. in a comment (1928), 6 Can. Bar Rev. 729, written before the Supreme Court of Canada had affirmed the judgment of the Saskatchewan court.

in cases of intestacy, the case is different when it is a question of construing an actual will, and one may wonder whether courts have not sometimes lost sight of the fact that in the construction of a will it is after all the intention of the testator to which effect should be given (*h*). On the other hand, the notable judgments of Adams J. and the Court of Appeal of New Zealand in the case of *Day v. Collins* (*i*) contain an illuminating review of the cases, concluding in favour of the admissibility of extrinsic evidence of the testator's intention with the result that a bequest to "my wife" was held to be a bequest not to his "lawful wife" whom he had deserted many years before, but to another woman whom he had subsequently "married" and to whom in a former will, since revoked, he had made a bequest under the description "my wife Emily Sophia Collins." *Inter alia* reliance was placed upon *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (*j*) as a case supporting the admissibility of extrinsic evidence to show what meaning should be given to words used by a testator.

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(*h*) Cf. C.A.W., (1928), 6 Can. Bar Rev. at pp. 730-731.

(*i*) [1925] N.Z.L.R. 280.

(*j*) [1915] A.C. 207.

## CHAPTER XXXIX.

### LEGITIMATION BY SUBSEQUENT MARRIAGE AND BY ADOPTION OR RECOGNITION\*

After the publication of my comment (a) on the decision of Farwell J. in the *Luck* case (b), that decision was reversed by the Court of Appeal (c)—Greene M.R. and Luxmoore L.J., Scott L.J. dissenting—and the two branches of the case have been discussed by Taintor in his recent article (d). I venture to add some supplementary observations with especial reference to the law of the provinces of Canada and other matters not specifically discussed by Taintor.

David Luck was the illegitimate son of Frederick Charles Luck, who, at the time of David's birth (1906) was domiciled in England and had not been divorced from his first wife. After Frederick's divorce and second marriage and his acquisition of a domicile of choice in California, he (in 1925) publicly acknowledged David as his child, received him into his home with the consent of the second wife (not David's mother) and adopted him as his legitimate child, and the effect, according to the relevant statute of California (e), was that David was "thereupon deemed legitimate from the time of his birth."

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\*This chapter reproduces a comment published (1941), 19 Canadian Bar Review 37-44. This comment is a sequel to the comment reproduced in chapter 38.

(a) See chapter 38.

(b) *In re Luck's Settlement Trusts, In re Luck's Will Trusts, Walker v. Luck et al.*, [1940] Ch. 323.

(c) [1940] Ch. 864.

(d) *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940), 18 Can. Bar Rev. 589. at pp. 621 ff.

(e) Civil Code of California (1937), s. 230. As Taintor points out (18 Can. Bar Rev. 622, note 156B) separate provision is made by s. 228 for adoption of a stranger as distinguished from legitimation of a natural child by adoption. In England, and in the provinces of Canada, it would appear that whatever provision has been made, or is likely to be made, for adoption of a natural child is and will be made within the general scheme of adoption of children. It is interesting to note that in California it has been held that s. 230 is operative there even though the adopting parent is not domiciled in California at the time of the adopting act. See *In re Lund's Estate* (1945), 159 P. (2nd) 643, and an instructive comment in (1945), 59 Harvard L. Rev. 128.

The first question was whether David was a child of Frederick within the meaning of the will of Frederick's father, who left his residuary estate to trustees in trust for all his children living at his death who should attain the age of twenty-one years, the income of each child's share to be paid to that child during his life, and that share then to be held in trust for all the children of that child who should attain the age of twenty-one years, in equal shares. The testator died in 1896, and his son Frederick died in 1938, so that, without any relation back of David's legitimation, he was entitled to share in his father's share, if English conflict rules would permit of the recognition in England of the legitimating effect of his recognition or adoption under California law. On this first question Farwell J. decided in David's favour, but his decision was reversed by a majority judgment of the Court of Appeal, to which I will return later.

The second question was whether David was a child of Frederick within the meaning of the marriage settlement of Frederick's parents, made in 1867 in contemplation of the marriage, by which it was provided that after the death of the survivor the settled property should be held in trust for such of the issue of the marriage as they should appoint. In 1888 they exercised this power of appointment and directed that the settled property should be held in trust for all the children of their marriage, and directed that the share of each child should be retained by the trustees, and that the trustees should pay the income thereof to the child during his or her life and after his or her death should divide the share equally between all the children of that child who should be born within 21 years after the death of the survivor of Frederick's parents. On this second question also Farwell J. decided in David's favour, notwithstanding that this involved holding that David was a grandchild of Frederick's parents born within twenty-one years after the decease of the survivor of those parents. The grandmother died in 1892, and the grandfather, as already mentioned, in 1896, so that the twenty-one year period expired in 1917, and David was not at that date a child, legitimate or legitimated, of Frederick. The reversal of Farwell J.'s decision on the first question involved of course the reversal of his decision on the second question, without any need to consider the apparently insuperable difficulty of giving effect to the relation back of David's legitimation so as to enable him to take a share under the settlement in the teeth of the rule

against perpetuities (*f*); and further observations on the second question would seem to be unnecessary (*g*).

As regards the first question it was to be hoped that the House of Lords (*h*) would reverse the Court of Appeal and restore the judgment of Farwell J., and, in particular, would decline to dispose of the case on the analogy of the old law as to legitimation by subsequent marriage.

By way of premise to the following observations it may be noted that formerly domestic English law made no provision for either (1) legitimation by subsequent marriage or (2) legitimation by recognition or adoption by a father of his natural child or (3) adoption of a stranger. In the case of (1) and (3) the domestic law of England (and Wales) was changed by the Legitimacy Act, 1926, and the Adoption of Children Act, 1926, respectively. It is true that the *Luck* case involved (2), and not (3), but it would appear that while (2) is not expressly mentioned in the Adoption of Children Act, 1926, the statute is available, in some circumstances at least, for the purpose of adoption by a father of his natural child (*i*). There would seem therefore to be some justification for invoking in the *Luck* case the analogy of adoption rather than the analogy of legitimation by subsequent marriage. The Adoption of Children Act, 1926, does not, it is true, provide for the recognition in England of "adoption" elsewhere, but, in the case of an application in England or Wales for an adoption order, the applicant must be "both domiciled in England and Wales or in Scotland and resident in England or in Wales" (*j*). So far as any implication with regard to a corresponding conflict rule may be drawn from the provision just mentioned, the implication is that the domicile of the adopter at the time of the adoption is alone material. In Ontario a similar implication may possibly be found in the provision that in the case

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(*f*) [1940] Ch. at pp. 884-885.

(*g*) See the discussion by Taintor, 18 Can. Bar Rev. 625-626.

(*h*) Leave to appeal to the House of Lords was granted: [1940] Ch. 919.

(*i*) Cf. *In re C, In re Adoption of Children Act, 1926*, [1938] Ch. 121, in which the court approved of the adoption of an illegitimate daughter by her mother. See also the Adoption of Children (Regulation) Act, 1939.

(*j*) Postponement of Enactments (Miscellaneous Provisions) Act, 1939.

of domestic adoption the adopter must be domiciled in Ontario (k).

The Legitimacy Act, 1926, changed not only the domestic rule, but also the conflict rule, of English law, with regard to legitimation by subsequent marriage. As regards both the domestic and the conflict rules the statute makes the domicile of the father at the time of the subsequent marriage the sole connecting factor, domicile in England or Wales for the domestic rule and, for the conflict rule, domicile in a country other than England or Wales by the law of which legitimation by subsequent marriage is recognized. The statute provides only for legitimation *a praesenti*, that is, from the time of the marriage or from the coming into effect of the statute, whichever is later, and makes no provision for legitimation *ab origine*, that is, from the time of the child's birth. It is true that if a person claims to have been legitimated *ab origine* under a foreign law, he can not rely upon the statute as making the domicile of his father at the time of the marriage the sole connecting factor for the purpose of legitimation by subsequent marriage, and consequently can not invoke the benefit of any analogy if he claims that he is entitled to be regarded in England as having been legitimated *ab origine* by his recognition or adoption by his father under the law of his father's domicile at the time of the adoption without regard to the domicile at the time of the child's birth. The situation is, however, entirely different, it is submitted, if a person is claiming only to be legitimated *a praesenti* by virtue of his recognition or adoption by his father under a foreign law. Of the available analogies, a court might reasonably avail itself of the analogy of the statutory attitude with regard to domestic English adoption, or the analogy of the statutory attitude with regard to legitimation by subsequent marriage in both domestic English law and English conflict of laws, and say that the domicile of the adopter at the time of the adoption is the sole criterion. The majority of the Court of Appeal in the *Luck* case did neither of these things, and instead, summarily rejecting the analogy of the Legitimacy Act, 1926 (l), used the analogy of the old law with regard to legitimation by subsequent marriage, and imported into the consideration of legitimation *a praesenti* by recognition or adoption the harsh rule which was a part of the old law as to legitimation *ab*

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(k) See chapter 38.

(l) [1940] Ch. at p. 884.

*origine* by subsequent marriage. This rule, which Scott L.J. in the *Luck* case calls the *Wright-Grove* rule (*m*), required the law of the domicile of the father, both at the time of the child's birth and at the time of the subsequent marriage of the parents to have been a law which recognizes legitimation by subsequent marriage, and, consequently, precluded forever from the possibility of legitimation by subsequent marriage a child who was born at a time when his father was domiciled in England. It is difficult to think of any defence for the rule on the merits (*n*) or to understand the argument that the child must have at birth a potential capacity for legitimation. The rule rests upon no authority that is binding on the House of Lords, and even in the Court of Appeal there was no authority requiring the application of the rule to legitimation by recognition or adoption.

A question of especial interest to Canadians is whether the *Wright-Grove* rule is in force in the provinces of Canada. In Quebec legitimation by subsequent marriage has long been recognized, and is provided for by articles 237, 238 and 239 of the Civil Code of Lower Canada; and it appears (*o*) that legitimation depends upon the law of the domicile of the father at the time of the marriage, without regard to the law of his domicile at the time of the child's birth (*p*). In the other provinces of Canada, on the recommendation of the Conference

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(*m*) The reference is to the cases of *In re Wright's Will Trusts* (1856), 2 K. & J. 595, and *In re Grove, Vaucher v. Solicitor to the Treasury* (1888), 40 Ch. D. 216. The former case was decided by Sir W. Page Wood V.C., and in *Udny v. Udny* (1869), L.R. 1 H.L. (Sc.) 441, the same judge, then become Lord Hatherley, Lord Chancellor, said, by way of *obiter dictum*, that he saw no reason to retract the opinion expressed by him in the earlier case. The *Grove* case was decided by the Court of Appeal. The opinions expressed in the Court of Appeal in the earlier case of *In re Goodman's Trusts* (1881), 17 Ch. D. 266, were *obiter dicta* as regards the rule now in question, because the father was domiciled in Holland both at the time of the birth of the child who was the sole claimant in the case and at the time of the subsequent marriage, although the case is sometimes cited as if it were a decision of the Court of Appeal on the point: *cf.* Cheshire, *Private International Law* (2nd ed. 1938) 389; (1940), 18 Can. Bar Rev. 620.

(*n*) *Cf.* Scott L.J., [1940] Ch. at pp. 908 ff. The rule is discussed by Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940), 18 Can. Bar Rev. 589, at pp. 618-627. He considers it a necessary sequel of the doctrine of relation back of legitimation — a doctrine which, he submits, should be overruled by the House of Lords.

(*o*) In accordance with the opinion of Savigny, *System*, vol. 8, § 380.

(*p*) Johnson, *Conflict of Laws*, vol. 1 (1933) 346.

of Commissioners on Uniformity of Legislation in Canada (*q*) statutes were passed (some years before the law of England was changed by the Legitimacy Act, 1926) providing for legitimation by subsequent marriage. These provincial statutes differ from the statute of 1926 in two respects. Firstly, they provide that a child whose parents intermarry "shall for all purposes be deemed to be and to have been legitimate from the time of birth," and, secondly, they make no reference to anyone's domicile at any time. In *Re W.* (*r*) a person was held to be legitimated in Ontario by virtue of the Ontario legislation notwithstanding that he was born out of wedlock in England in 1878 and that his parents were domiciled in England both at the time of his birth and at the time of their subsequent marriage in England in 1881 (*s*). As the law of England stood at the time of the child's birth, at the time of the subsequent marriage of his parents, and at the time when the case was decided in Ontario, the child was not legitimated by English law, so that obviously the law of the domicile is wholly immaterial as regards the legitimating effect in Ontario of the Ontario statute.

In each of the provincial statutes which follow the model prepared by the Conference of Commissioners on Uniformity of Legislation in Canada there is a provision that nothing in the statute shall affect any right, title or interest in or to property vested in any person prior to the coming into effect of the statute, or, in the case of marriage after the coming into effect of the statute, prior to the marriage. The Ontario statute in its latest version (*t*) also provides that "a child born while its father was married to another woman or while its mother was married to another man shall not inherit in competition with the lawful children of either parent." This discrimination against adulterine children is much less severe than

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(*q*) Conference Proceedings (1919) 53 and (1920) 7, 18; Can. Bar Ass. Year Book (1919) 277 and (1920) 311, 322. In 1933 the Conference declined to recommend revision of the provincial statutes in the light of the Legitimacy Act, 1926; Conference Proceedings (1933) 14, 35; Can. Bar Ass. Year Book (1933) 238, 259.

(*r*) (1925), 56 O.L.R. 611, [1925] 2 D.L.R. 1177.

(*s*) This decision is not affected by the fact that on another point the case was not followed in *Re Cummings*, [1938] O.R. 486, 654, [1938] 3 D.L.R. 611, [1938] 4 D.L.R. 767. In the latter case it seems to have been assumed that the domicile of the father was immaterial as regards the legitimation of the child in Ontario.

(*t*) R.S.O. 1937, c. 216, s. 2, re-enacting 1927, c. 52, s. 3.

that made in England by the Legitimacy Act, 1926, which provides that if the father was or is at the date of his marriage with the mother domiciled in England or Wales, nothing in the statute "shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born" (*u*).

Returning now to the decision of the Court of Appeal in the *Luck* case, while I respectfully agree with Scott L.J. both in his disapproval of the *Wright-Grove* rule and his opinion that in any case that rule should not be applied by analogy to legitimation by recognition or adoption under a foreign law, I venture to express my dissent from one aspect of his reasons. He argues vigorously (*v*) in favour of what he calls the "universality" of status, that is, status in a wide sense as including its "context" in the law which creates it or its "legal attributes" or "consequences" under that law, so that if the law of a given country is the law determining the particular status of a person and that law attributes to that status certain personal capacity or incapacity and certain rights and duties, then "that self-same personal capacity or incapacity, and the self-same rights and duties" should be attributed to the status in another country, unless the courts of the latter country are bound by some definite and positive rule of municipal law which prohibits them from giving effect to the status or commands them to introduce some specific condition or other modification, when asked to apply the consequences which by the law of the former country would flow from that status in the particular circumstances of the case before them (*w*).

With all respect I submit that Scott L.J.'s theory of the universality of status tends to confuse the solution of problems of the conflict of laws precisely because it confuses two things which ought to be distinguished, namely, the existence of a particular status and the consequences of that status. The par-

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(*u*) Section 1(2). This limitation in the case of domestic English legislation will not, by English conflict rules, prevent the recognition in England of the legitimation of an adulterine child by virtue of the foreign domiciliary law of the father, if the foreign law contains no similar limitation: *In re Askew*, [1930] 2 Ch. 259; *Collins v. Attorney General* (1931), 47 Times L.R. 484, 145 L.T. 551; cf. Cheshire, *Private International Law* (2nd ed. 1938) 390-391; Dicey, *Conflict of Laws* (5th ed. 1932) 571. The *Askew* case is discussed in chapter 2, § 1(4), chapter 7, § 7, and chapter 8, § 5(3).

(*v*) [1940] Ch. 864, at pp. 888 ff.

(*w*) See especially [1940] Ch. at p. 894.

ticular example which Scott L.J. gives of a "definite and positive rule of municipal law" which prohibits a court in England from giving effect to a status created by the law of a foreign country is the case of *Birtwhistle v. Vardill* (x). This case does not, however, need to be explained as an exception to the universality of status. Accurate characterization of the question makes the result clear. The claimant was unquestionably legitimated under the law of his father's foreign domicile, and his status as a legitimated person was not in controversy. The question which had to be decided was not one as to his legitimacy, but as to his capacity to take as heir to land in England. This was a question of succession to land governed by the *lex rei sitae*, and once it was decided that English succession law required the heir to have been born in lawful wedlock, it was clear that the claimant's right to succeed must be denied, without denying the existence of his status as a legitimated person (y).

In more general terms, it is submitted that in the conflict of laws it is essential to distinguish between status and the incidents or consequences of status, and between status and capacity. The existence of a status created by a foreign law which according to the conflict rules of the forum is the proper law governing status may well be recognized in the forum, whereas the incidents or consequences of status and the capacity of the person who has a particular status may involve questions that are not accurately characterized as questions of status and that may be governed by some other law than the law which governs status (z).

Finally, without elaborating here what I have discussed elsewhere, I venture to safeguard myself, in approving of the result

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(x) (1840), 7 Cl. & F. 895.

(y) See also chapter 4, § 8, and chapter 22, § 2. Contrast *Udny v. Udny* (1869), L.R. 1 H.L. (Sc.) 441, in which the question was one of legitimation, not one of succession, that is, the only controverted question was whether the respondent had been legitimated by the marriage of his parents, and the answer to this question depended of course upon the domicile of his father. If he had been so legitimated it was beyond question that by the *lex rei sitae* he was entitled to succeed to the entailed estates of Udny (in Scotland).

(z) See chapter 3, § 8; cf. Allen, *Status and Capacity* (1930), 46 L.Q. Rev. 277, at pp. 293 ff.; Robertson, *Characterization in the Conflict of Laws* (1940) 145; Taintor (1940), 18 Can. Bar Rev. 589, at pp. 591-592, 691-694. See also the observations of Greene M.R. in *Baindail v. Baindail*, [1946] P. 122, at p. 128, quoted at the end of § 13 of chapter 40.

of Scott L.J.'s judgment, from seeming to approve of the general, if somewhat vague, benediction which the learned judge gives to the doctrine of the *renvoi*. It may well be that as regards the existence of status, as distinguished from the incidents or consequences of status, or as distinguished from capacity, the law of the domicile in an English conflict rule means whatever a court of the domicile would decide, but there are many difficulties, both practical and theoretical, with regard to any supposed general rule that the law of the domicile always has that meaning.

## CHAPTER XL.

### MARRIAGE, DIVORCE AND ANNULMENT\*

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#### § 1. Introduction.

In England and the common law provinces of Canada, the law relating to annulment of marriages is derived from the law formerly administered in the English ecclesiastical courts, as modified by statute. The jurisdiction to annul a marriage

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\*This chapter was originally written in the form of a report on the Conflict of Laws relating to the Formation and Dissolution of Marriage submitted to the International Congress of Comparative Law which took place at The Hague in 1932. That report was published in part as an article in [1932] 4 Dominion Law Reports 1-51. It has been substantially rewritten for publication in the present book.

was formerly vested exclusively in the ecclesiastical courts of England, but by virtue of modern statutes is now vested in civil courts, both in England and in the common law provinces of Canada. In Quebec the law as to annulment of marriages and annulment jurisdiction is vested in civil courts under the provisions of the Civil Code of Lower Canada

On the other hand, in the case of divorce, there was no ecclesiastical law or jurisdiction, and the jurisdiction of civil courts is of purely statutory creation.

By way of introduction to the discussion of both annulment of marriage and divorce, some account will first be given of ecclesiastical and civil law and jurisdiction in England ( § 2 ), followed by a statement of matrimonial jurisdiction in the provinces of Canada ( § 3 ). Then will follow a discussion of divorce, limited to questions of jurisdiction ( §§ 4, 5 and 6 ). The discussion of annulment of marriage will, however, include both law and jurisdiction ( §§ 7 to 11 ), and will include (in §§ 7, 9 and 10) various aspects of the canon (ecclesiastical) law relating to marriage. The chapter will close with a brief notice of judicial separation ( § 12 ), and an extended discussion of terminable and polygamous marriages ( § 13 ).

The following passage from the judgment of Brett L.J. in *Niboyet v. Niboyet* (a) is worth quoting at the beginning of a discussion of marriage because of its precise and correct use of the words "contract," "status" and "relation" in this connection:

Marriage is the fulfilment of a contract satisfied by the solemnization of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community. That relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage are not imposed or defined by contract or agreement but by law.

## § 2. Ecclesiastical and Civil Law and Jurisdiction in England.

In England, the ecclesiastical courts had, certainly from the twelfth century, undisputed jurisdiction in matrimonial causes.

(a) (1878), 4 P.D. 1, at p. 11, quoted in part by Viscount Reading C.J. in *Rex v. Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K.B. 634, at p. 641.

Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, and as to nullity of marriage, were decided by the ecclesiastical courts, administering canon law. Their jurisdiction included suits for the restitution of conjugal rights, suits for nullity (either when the marriage was void *ab initio* or when it was voidable), and suits for divorce *a mensa et thoro* by reason of adultery or cruelty. If they pronounced a marriage null, the parties were said to be divorced, but the courts had no power to decree divorce *a vinculo matrimonii* if there had been a valid marriage, that is, for cause arising since the marriage (*b*). If a marriage was not void, but was merely voidable, and was not declared null by an ecclesiastical court in the lifetime of both parties, it became unimpeachable after the death of either party, as the only effect of the making of a declaration of nullity would have been to bastardize the issue of the marriage (*c*).

Before the Reformation in England the law administered by the English ecclesiastical courts was kept more or less uniform with that administered by corresponding ecclesiastical courts on the continent of Europe by a common appeal to the Pope; but after the Reformation appeals to the Pope were prohibited by statute, and the English ecclesiastical courts were subject only to such appeals within the kingdom as were provided by statute, and administered English statute law and such part of the former canon law as was held to be in force in England under the new condition of affairs (*d*). As before, divorce in the strict sense of the dissolution of an originally valid marriage was not obtainable in the ecclesiastical courts, but after the Reformation it came to be granted by private act of parliament, with a regularity in the procedure for obtaining it which caused it to rank among legal remedies (*e*). The proceeding was in spirit a judicial act, though in form a legislative act (*f*).

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(*b*) Cf. Holdsworth, *History of English Law*, vol. 1 (3rd ed. 1922) 621-623.

(*c*) Cf. Poynter, *Marriage and Divorce* (2nd ed. 1824) 154-155. As to the retroactive effect of a declaration of the nullity of a voidable marriage, see chapter 42.

(*d*) As to the binding force of the Roman canon law in the English ecclesiastical courts before the Reformation, see note (*a*) in § 10 of the present chapter, *infra*.

(*e*) Cf. Westlake, *Private International Law*, notes preceding § 43.

(*f*) *Shaw v. Gould* (1868), L.R. 3 H.L. 55, at p. 85, Lord Westbury.

Before 1857 the English civil courts had no jurisdiction to entertain a suit brought for the express purpose of having a marriage declared null; but if the decision of some question of succession or other question of property and civil rights depended upon the validity or invalidity of an alleged marriage, or if a person's criminal liability (for example, on a charge of bigamy) depended upon the validity of an alleged prior subsisting marriage, the court had of course jurisdiction to adjudicate upon the validity of the marriage in question, and if it found that the marriage was void, and not merely voidable, might decide accordingly the case which was properly before it, and in this sense might incidentally make a declaration of nullity. In such a case a civil court might thus incidentally declare that the marriage was void *ab initio*, but if the marriage was voidable merely and had not yet been declared void by an ecclesiastical court, the civil court had no jurisdiction to declare it void. There were also some ecclesiastical courts which had jurisdiction in testamentary causes but not in matrimonial causes, and they, like the civil courts, might have occasion to adjudicate upon the validity of a marriage as an incident to some other matter properly before them (*g*).

By the Matrimonial Causes Act, 1857, the jurisdiction of the ecclesiastical courts in matrimonial matters was transferred to a new civil court entitled the Court for Divorce and Matrimonial Causes (*h*), so that for the first time a civil court in England obtained jurisdiction to entertain a suit for the annulment of a marriage, a suit for restitution of conjugal rights, and a suit for divorce *a mensa et thoro* (thenceforward called judicial separation). The statute of 1857 not only transferred to a civil court the former matrimonial jurisdiction of the ecclesiastical courts, but also conferred on the civil court the power, which no court in England had previously possessed, to decree the dissolution of a valid marriage (*i*).

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(*g*) Cf. Poynter, *Marriage and Divorce* (2nd ed. 1824) 166.

(*h*) Since 1875, as a result of the consolidation of the English courts effected by the Judicature Acts, 1873 and 1875, and continued by the Judicature (Consolidation) Act, 1925, the jurisdiction in question has been exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice. The Matrimonial Causes Act, 1937, amended the law as to divorce and annulment in important respects, and some of its provisions will be noted later in the present chapter.

(*i*) See 8 *Encyclopaedia Britannica* (11th ed. 1910-1911) 337 ff., article by Lord St. Helier (Sir Francis Henry Jeune).

### § 3. Matrimonial Jurisdiction in Canada.

The law of eight of the nine provinces of Canada was derived from English law, but the dates of the reception or adoption of English law were different in the several provinces, namely, 1758 in Nova Scotia and New Brunswick, 1763 in Prince Edward Island, 1792 in Ontario (then Upper Canada), 1858 in British Columbia, and 1870 in Manitoba, Alberta and Saskatchewan.

For the purpose of the present subject the provinces of British Columbia, Alberta, Saskatchewan and Manitoba may be shortly disposed of. The date of the adoption of English law in each of them was subsequent to the coming into force of the Matrimonial Causes Act, 1857, that is, after the statutory change by which in England matrimonial causes, including divorce *a vinculo matrimonii*, became for the first time subjects of civil law and subjects of jurisdiction of civil courts. Consequently the English law introduced in each of these four provinces included the English statutory law as to divorce, declaration of nullity and other matrimonial causes; and the general terms of the provincial legislation constituting courts of justice in those provinces have been held to be sufficient to confer upon those courts jurisdiction to decree divorce, make declarations of nullity and to give other relief in matrimonial causes (*j*).

The position of the provinces of Nova Scotia, New Brunswick and Prince Edward Island may also be briefly stated. English law was introduced in these provinces long before the passing of the Matrimonial Causes Act, 1857, in England, and therefore at a time when matrimonial causes were governed in England by ecclesiastical law and were the subject of ecclesiastical jurisdiction; but after the introduction of English law and before these provinces became parts of the Dominion of Canada, jurisdiction in divorce, declarations of nullity and other matrimonial causes was conferred on provincial courts by provincial legislation; and this jurisdiction still exists.

It should be noted at this point that as the result of any province becoming a part of the Dominion of Canada, its legislature ceased to be competent to legislate on the subject of marriage and divorce, (this subject having been assigned by

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(*j*) *Watts v. Watts*, [1908] A.C. 573; *Walker v. Walker*, [1919] A.C. 947, 48 D.L.R. 1; *Board v. Board*, [1919] A.C. 956, 48 D.L.R. 13; *Fletcher v. Fletcher* (1919), 13 Sask. L.R. 51, 50 D.L.R. 23.

the British North America Act, 1867, to the exclusive legislative jurisdiction of the Dominion Parliament (*k*), but continued to be competent to legislate on the solemnization of marriage within the province, (this subject having been assigned to the exclusive legislative jurisdiction of each provincial legislature). On the other hand any legislation passed by a competent provincial legislature before the entry of the province into the Dominion of Canada remained in force until subsequently amended or repealed by the Dominion Parliament in the case of marriage and divorce, or by the provincial legislature in the case of solemnization of marriage. As to the formalities of solemnization of marriage all the provinces have passed statutes, and amended them from time to time. As to divorce and declaration of nullity of marriage, the Dominion Parliament alone is competent to change whatever was the law in a particular province at the time of its entry into Confederation; and that Parliament has not in any case taken away any jurisdiction which the courts of any province already possessed (*l*).

As already pointed out, English law was introduced in Upper Canada in 1792, that is, at a time when no civil court in England had jurisdiction to entertain a suit for the declaration of nullity of a marriage, and no court of any kind in England had jurisdiction to decree dissolution of a valid marriage. Furthermore the provincial legislation, by which courts of justice were created in the province from time to time, defined the jurisdiction of those courts by conferring upon them the jurisdiction of certain specified English civil courts or jurisdiction with regard to certain specified matters; and at no time before the entry of Upper Canada, under the name of the province of Ontario, into the Dominion of Canada in 1867, had the legislature of Upper Canada impliedly or expressly conferred upon any court jurisdiction either to declare a marriage null or to decree dissolution of marriage. Consequently, the courts of Ontario have today no jurisdiction for these purposes (*m*), except so far as it may have been subsequently conferred by legislation of the Dominion Parliament, although, like

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(*k*) As to the scope of "marriage and divorce" as compared with "solemnization of marriage within the province," see *Re Marriage Legislation in Canada*, [1912] A.C. 880, 7 D.L.R. 629.

(*l*) The Dominion Parliament has, however, effected some extension of the divorce jurisdiction of the courts of those provinces.

(*m*) *Vamvakidis v. Kirkoff* (1929), 64 O.L.R. 585, [1929] 4 D.L.R. 1060.

an English civil court before 1857, an Ontario court might have adjudicated upon the validity of an alleged marriage as a necessary incident to the decision of some question of property or civil rights properly before the court or to the decision of some question of criminal liability (*n*).

Before 1930 the Ontario legislature, purporting to legislate with regard to solemnization of marriage within the province, had conferred upon the Supreme Court of Ontario jurisdiction to make a declaration of nullity in the case of a marriage celebrated in contravention of the Ontario Marriage Act between persons either of whom was under the age of 18 years without the consent of father, mother or guardian, but the question whether this legislation was within the power of the provincial legislature was much debated (*o*), and it was repealed in 1932. The jurisdiction of the Ontario courts was, however, notably extended by the enactment by the Dominion Parliament of the Divorce Act (Ontario), 1930 (*p*), as follows:

1. The law of England as to the dissolution of marriage and as to the annulment of marriage, as that law existed on the fifteenth day of July, 1870, in so far as it can be made to apply in the province of Ontario, and in so far as it has not been repealed, as to the province, by any Act of the Parliament of the United Kingdom or by any Act of the Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the province, by any such Act, shall be in force in the province of Ontario.

2. The Supreme Court of Ontario shall have jurisdiction for all purposes of this Act.

Some of the modifying clauses of this statute are not crystal clear. The supposed justification for the adoption in a statute of 1930 of the law of England as of 1870 presumably is that it made the law of Ontario uniform with the law of Manitoba, Saskatchewan and Alberta in this respect. There would seem, however, to be no justification for leaving the law of divorce in Canada permanently in an antiquated state, especially in view of the improvements made in the law of England by the Matrimonial Causes Act, 1937, and the members of the Parlia-

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(*n*) As to this point, see *Reid v. Aull* (1914), 32 O.L.R. 68, 19 D.L.R. 309.

(*o*) Ultimately the Ontario statute and a similar Alberta statute were held by the Supreme Court of Canada to be valid. See chapter 4, § 2.

(*p*) By Ontario Statutes, 1933, c. 29 s. 2 (now R.S.O. 1937, c. 207, s. 35) it is provided that so many of the provisions of the Dominion statute as are or may be within the legislative competence of the legislature of Ontario "are hereby enacted as if fully set out in this Act."

ment of Canada ought to consider seriously the notable preamble to that statute, as follows:

Whereas it is expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation, the relief of conscience among the clergy, and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended . . .

The province of Quebec must be separately considered. Its courts have jurisdiction in certain circumstances to declare a marriage null, by virtue of provisions contained in the Civil Code of Lower Canada, promulgated in 1866 by the authority of the legislature of the old Province of Canada, and remaining in force in the province of Quebec, after it became in 1867 part of the Dominion of Canada. The fifth title of this code treats in chapter one of the qualities and conditions necessary for contracting marriage, in chapter two of the formalities relating to the solemnization of marriage, in chapter three of separation from bed and board, and in chapter four of actions for annulling marriage. Provision is made in chapter four for a declaration of nullity in most of the cases in which an impediment may exist under chapter one, subject to limitations as to the persons by whom and the time within which an application may be made to a court (*q*).

Although the courts of Quebec have jurisdiction to make declarations of nullity of marriage, and to decree divorce *a mensa et thoro*, they have no jurisdiction to decree divorce *a vinculo*; and article 185 of the Civil Code of Lower Canada provides: "Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble." It does not follow, however, that a Quebec court will not recognize the validity of a divorce decreed elsewhere by competent authority. In other words, there is no stringent rule of public policy which prevents a Quebec court from admitting the validity of a decree made by the court of the domicile of the parties in another province or in any other country. On the other hand, the law of Quebec, like the law of the other provinces and of England, rejects the doctrine that parties by marriage under the law of a country which recognizes divorce have an

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(*q*) See *Despatie v. Tremblay*, [1921] 1 A.C. 702, 58 D.L.R. 29. The subject is discussed in Johnson, *Conflict of Laws*, vol. 2 (1934) 178 ff.

acquired right to a divorce under that law which they carry with them to a new domicile (*r*).

If the parties are domiciled in Quebec their only means of obtaining a divorce is by a private act of the Dominion Parliament. Before it was judicially ascertained that the courts of the western provinces possessed jurisdiction to decree divorce, the Dominion Parliament entertained applications for divorce made by persons domiciled in those provinces, as it did before 1930 in the case of persons domiciled in the province of Ontario, and as it still does in the case of persons domiciled in the province of Quebec. Obviously an act of the Dominion Parliament divorcing two named parties is binding on all Canadian courts, no matter where the parties are domiciled; but outside of Canada the validity of such an act of parliament would presumably depend (at least in any country recognizing domicile as the criterion of jurisdiction) upon the domicile of the parties in some province of Canada.

For many years past the practice with regard to parliamentary divorces in Canada has been to make no distinction between a petition by a wife or a petition by a husband; either is entitled to divorce on proof of adultery of the other. In England it was not until 1923 that the law was amended so as to make it unnecessary for a petitioning wife to prove cruelty or some one of certain other specified grounds of divorce in addition to adultery on the part of the husband. In 1925 the Dominion Parliament passed a statute, applicable to any provincial courts possessing divorce jurisdiction, adopting the same rule that a petitioning wife need not prove more than adultery of the husband.

#### § 4. Domicile and Divorce Jurisdiction.

The discussion in §§ 4, 5 and 6 relates primarily to English or Anglo-American doctrines with regard to divorce jurisdiction and the recognition of foreign divorces. The result is of course to give a very incomplete picture of the amazingly complicated and varied situations arising from the fact that in different countries of the world widely different theories prevail with regard to the basis of divorce jurisdiction and the recognition of foreign divorces, and also with regard to the law to be applied

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(*r*) Cf. Lafleur, *Conflict of Laws* (1898) 80-87. As to the recognition of foreign decrees of divorce, see § 6 of the present chapter, *infra*. The subject is discussed in Johnson *op. cit.*, vol. 2 (1934) 1 ff.

in cases involving parties who are domiciled in, or nationals of, some country other than that of the forum. Diversity of both domestic rules and conflict rules of different countries are especially deplorable in the field of divorce, because the social consequences of this diversity are especially important (a).

According to English doctrine, which prevails also in the common law provinces of Canada, subject to statutory modifications both in England and in Canada (b), the sole basis of the jurisdiction of a court to decree divorce is the domicile of the parties within the country in or for which the court sits, and the domicile of the parties means the domicile of the husband. The leading authority for the first proposition is *Le Mesurier v. Le Mesurier* (c) and that for the second proposition is *Attorney-General for Alberta v. Cook* (d). Each of these cases was decided by the Privy Council, sitting in the first case on appeal from Ceylon, and in the second case on appeal from Alberta, and therefore in each case expounding the law of the forum, that is, Ceylon in the one case and Alberta in the other, and is less authoritative as to the law of England (e). The second case is, however, buttressed by the earlier decision of the House of Lords, on appeal from Scotland, in *Lord Advocate v. Jaffrey* (f) and by the later decision in *H. v. H.* (g)

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(a) See especially Rabel, *The Conflict of Laws: a Comparative Study*, vol. 1 (1945), chapters 11, 12 and 13; cf. Cheshire, *The International Validity of Divorces* (1945), 61 L.Q. Rev. 352.

(b) See § 5 of the present chapter, *infra*. As regards the whole topic of divorce jurisdiction in England and in other common law units of the British Empire, see especially Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938) 200 ff. This book is, so far as I am aware, the only one in which the whole body of what the author appropriately calls "Anglo-Dominion" case law relating to the topics covered by the title is reviewed and discussed.

(c) [1895] A.C. 517.

(d) [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742. As to this case, see also § 5, *infra*.

(e) See chapter 10.

(f) [1921] 1 A.C. 146, 11 Brit. R.C. 1, a case relating to succession to movables, not divorce. See chapter 41 for some comments on the unjust or absurd results reached by the combination of the rule as to the identity of the domicile of husband and wife with some other rule.

(g) [1928] P. 206. Lord Merrivale P. negated the proposition that a husband, originally domiciled in England, who deserts his wife and is judicially separated from her on the ground of desertion, is disentitled to allege and prove, or is estopped from alleging and proving, that he has acquired a domicile elsewhere and that an English court has therefore no jurisdiction to entertain proceedings

and is doubtless accepted as law in England. Curiously enough, the decision of the Privy Council in the *Le Mesurier* case seems to have been accepted without question as stating the law of England. The rule thus established was probably derived from Story, although the view that it was a rule of "international law" or was in accord with some "recognized principle of the law of nations," as stated by the Privy Council, would seem to be untenable (*h*).

Not only is the jurisdiction of a court, according to English theory, based on the domicile of the parties, but the court, if it has jurisdiction, applies the domestic rules of the law of the forum, as regards both procedure and substantive law (*i*).

Domicile as a connecting factor must, logically and in accordance with the general rule (*j*), be characterized by the *lex fori*. This is obviously the case where a court decides either that it has or that it has not jurisdiction to decree divorce in a particular case; it must decide the question of jurisdiction upon the basis of its own decision as to what is the domicile of the particular parties. Even if the question is as to the recognition of the validity of a foreign decree of divorce, it appears also to be the settled rule that the court must decide according to the *lex fori* whether the parties were or were not domiciled in a given country at the material time so as to confer upon a court of that country jurisdiction to grant the decree (*k*).

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against him for divorce. It has been held that a person who as plaintiff has obtained a divorce, or who as defendant has attorned to the jurisdiction by appearing, is not estopped from disputing the validity of the divorce on the ground of the lack of jurisdiction of the court, but there is some authority for the view that he or she may be estopped from claiming in the character of husband or wife, *e.g.*, as beneficiary in a case of succession on death. See *Re Plummer, Plummer v. Sloan*, [1942] 1 D.L.R. 34, [1941] 3 W.W.R. 788 (Alta.), and cases there cited; cf. Cowan, case comment (1938), 16 Can. Bar Rev. 57.

(*h*) See Cook, Logical and Legal Bases of the Conflict of Laws (1942) 458 ff.

(*i*) That is, divorce is an exceptional case in which the court does not do what it often does in other cases, namely, consider whether by reason of foreign elements in the situation it should resort to foreign law. Cf. Sack, Conflicts of Laws in the History of English Law (Law: A Century of Progress (1937), vol. 3) 342, at pp. 375, 395-398.

(*j*) See chapter 5, § 2.

(*k*) See § 6(a) in the present chapter, *infra*.

## § 5. Divorce at the Suit of the Deserted Wife.

If the parties have a common domicile, substantially as well as technically, as, for example, if they both reside in the country of their common domicile, it seems reasonable enough to say that a court of the country in which they are domiciled, of the community to which they belong, has sole jurisdiction to grant a divorce. On the other hand, if the husband has deserted the wife in the country of their common domicile, and has acquired a new domicile in another country, and she continues to reside in the country of the former domicile, and technically her domicile follows his, and consequently a court of the old domicile has no jurisdiction, and a court of the new domicile has sole jurisdiction, to grant a divorce, the result is less easy to justify. The husband may obtain a divorce in the country of his new domicile. The wife may do so also, but this entails the hardship on her of suing in a country other than that of her residence (*l*). In the United States, at least as between different states of the United States, the husband, as in English law, might obtain a divorce in the state of his new domicile, but the wife is treated more fairly than she was by English law, and if she remains in the state of his old domicile, she may obtain a divorce there (*m*).

In Canada and England the deserted wife had to wait a longer time for some relief from the hardship of her position, and such relief had to be given by statute. Some earlier judicial efforts to give her relief (*n*) were frustrated by *Attorney-General for Alberta v. Cook* (*o*), and other more recent cases (*p*).

Whereas in the United States the sensible conclusion has been reached that in some circumstances a wife may have a

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(*l*) If there were uncertainty as to the country in which her husband has acquired a new domicile, if any, her position would be still more difficult.

(*m*) See chapter 41 for some observations about the treatment of the deserted wife in England and the United States respectively.

(*n*) See the dictum of Sir Gorell Barnes in *Armstrong v. Armstrong*, [1898] P. 178, at p. 185, and *Ogden v. Ogden*, [1908] P. 46, at p. 78, to which effect was given in *Stathatos v. Stathatos*, [1913] P. 46, and *De Montaigne v. De Montaigne*, [1913] P. 154. In some of these cases the English courts might properly have recognized the validity of foreign declarations of nullity and thus given the wife relief by way of annulment instead of divorce. See § 8 of the present chapter, *infra*.

(*o*) [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742.

(*p*) *H. v. H.*, [1928] P. 206; *Herd v. Herd*, [1936] P. 205.

separate domicile from that of her husband, in England and Canada the courts have established the rigid doctrine that in all circumstances the domicile of the wife is that of her husband (q). In *Lord Advocate v. Jaffrey* (r) the House of Lords, on appeal from Scotland, had held that the wife's domicile was that of her husband even though cause for judicial separation existed, if the parties had not been judicially separated, and in *Attorney-General for Alberta v. Cook* the Privy Council, on appeal from Alberta, held that the wife's domicile was that of her husband even if the parties had been judicially separated. The result of the latter case was that the wife's position was one of hardship comparable with that of the woman in *Ogden v. Ogden* (s).

In *Attorney-General for Alberta v. Cook* the marriage took place in 1913 in Ontario, where the husband was domiciled. Four years later the parties went to the United States. In 1918 the wife went to Alberta, where she resided continuously until the divorce proceedings. The husband followed his wife to Alberta, stayed for a time and was served there with notice of proceedings for judicial separation, and then went to British Columbia, and his subsequent place of residence was unknown. A decree for judicial separation was made in Alberta in 1921, and later the wife sued in Alberta for divorce. The suit was ultimately dismissed for want of jurisdiction, because the husband was domiciled either in Ontario (his domicile of origin) or in British Columbia or in some other place of which the court had no information, but at all events not in Alberta.

In Canada the Dominion Parliament passed the Divorce Jurisdiction Act, 1930, s. 2 of which provides as follows:

A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court shall have jurisdiction to grant such divorce provided that immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced.

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(q) For some observations on this, see chapter 41.

(r) [1921] 1 A.C. 146, 11 Brit. R.C. 1.

(s) [1908] P. 46, discussed in chapter 4, § 1, at pp. 48 ff., *supra*.

In England it was provided by the Matrimonial Causes Act, 1937, s. 13, as follows:

Where a wife has been deserted by her husband or where her husband has been deported from the United Kingdom, and the husband was immediately before the desertion or deportation domiciled in England or Wales, the court shall have jurisdiction for the purpose of any proceedings concerned with divorce, annulment of marriage, judicial separation, and restitution of conjugal rights.

These two statutes substantially alleviate the hardship of the deserted wife, although, oddly enough, in Canada the statute does not apply to the precise situation existing in the *Cook* case, and in England the statute does not apply to the precise situation existing in the *Ogden* case.

Neither statute provides that the wife can in any circumstances acquire or retain a domicile separate from that of her husband (*t*), so that, although the deserted wife may sue for divorce in the country of her husband's former domicile, or in that of his new domicile, succession to her movables on her death will be governed by the law of his new domicile (*u*). In Canada the wife may sue for divorce in the province where her husband was domiciled immediately before the desertion or in the province of his new domicile, but she may not sue in a third province even if she has become permanently resident there (*v*).

## § 6. Recognition of Foreign Divorces.

### (a) *Decree of a Court of the Domicile.*

It being premised that domicile as the criterion of jurisdiction and the connecting factor as to law means domicile as found by the court before which the validity of a foreign divorce is in issue (*a*), the primary rule in the law of England or of any country in which English rules of the conflict of laws prevail, is that recognition will be accorded of the validity of a divorce decree of the court of any other country, if the court is competent by its domestic rules to decree divorce (*b*), and if the husband is domiciled in the English sense in that country at the

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(*t*) Differing in that respect from some of the corresponding statutes of New Zealand and of Australian states: see Read, *Recognition and Enforcement of Foreign Judgments* (1938) 224 ff.

(*u*) *Lord Advocate v. Jaffrey*, *supra*.

(*v*) *Jolly v. Jolly* (1940), 55 B.C.R. 61, [1940] 2 D.L.R. 759, [1940] 2 W.W.R. 148.

(*a*) See chapter 5, § 2.

(*b*) *Bater v. Bater*, [1906] P. 209.

commencement of the suit for divorce (*c*). By way of parenthesis it should be mentioned here that the recognition of foreign divorces depends on jurisdiction of courts and does not involve any question of the choice of the proper law governing the merits of a suit for divorce. Just as an English or Canadian court, if it has jurisdiction to grant a divorce, always applies the domestic rules of the law of the forum (*d*), conversely, if it decides that a foreign court had jurisdiction to grant a divorce, it is not concerned with the foreign law of divorce, but will recognize the foreign divorce without regard to the nature of the causes for divorce which the foreign court considers sufficient.

Obviously the primary rule above stated will not justify the recognition in an English or Canadian court of a divorce granted by the court of a foreign country if the jurisdiction of the foreign court is based upon a residence in that country of the parties or of one of them sufficient under the law of that country but not amounting to domicile there in the English sense, as, for example, if the parties have gone, or one of them has gone, to that country, not with the intention of residing there permanently, but merely with the intention of complying with the local law and thereby conferring jurisdiction upon the court (*e*).

In Canada, as already mentioned (*f*), the Dominion Parliament has, by the Divorce Jurisdiction Act, 1930, empowered a court, of any province of Canada, which has jurisdiction to decree divorce, to entertain a wife's suit for divorce, if the husband was domiciled in the province, when he deserted her. If, for example, the husband is domiciled in Ontario and deserts his wife, an Ontario court may entertain the wife's suit for divorce, no matter where the husband is domiciled at the time of the commencement of the suit. The Ontario decree is of course entitled to recognition in the court of any other province,

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(*c*) *Simons v. Simons*, [1939] 1 K.B. 490; and see § 4 of the present chapter, *supra*. This primary rule does not cover all the cases in which a foreign divorce may be entitled to recognition: see § 6(b), *infra*. The rules in both classes of cases are subject to limitation in certain circumstances to be discussed in § 6(c), *infra*.

(*d*) See § 4, of the present chapter, *supra*.

(*e*) *Green v. Green*, [1893] P. 89 (Pennsylvania divorce); *Rex v. Woods* (1903), 6 O.L.R. 41 (Michigan divorce); *Lankester v. Lankester* [1925] P. 114 (South Dakota divorce).

(*f*) See § 5 of the present chapter, *supra*, where the corresponding change made in the law of England in 1937 is also noted.

because all Canadian courts are bound by the statute of the Dominion Parliament. An English court is, however, not bound by the statute, and if the question of the validity of the Ontario decree comes before an English court, that court will be obliged to ascertain the domicile of the husband at the time of the commencement of the Ontario suit. If the English court finds that he was domiciled at that time in Ontario, the Ontario decree is entitled to recognition in England. If the English court finds the husband to have been domiciled at that time outside of Ontario, then the Ontario decree is not entitled to recognition in England on the ground of its being a decree of the court of the domicile, but may in certain circumstances be entitled to recognition in England by virtue of the doctrine next to be discussed.

(b) *Decree Recognized by a Court of the Domicile.*

If a decree of divorce is made by a court which is not the court of the domicile, and therefore according to the principles already discussed is not entitled to recognition in England or Canada, it may, according to what we may call the doctrine of *Armitage v. Attorney-General* (*g*), nevertheless be entitled to recognition if it is proved that the validity of the decree would be recognized by a court of the domicile. In that case the husband was found by an English court to have been domiciled in New York when the decree was made by a court of South Dakota. Notwithstanding that the ground upon which the South Dakota decree was based would not have been ground for a divorce in either New York or England, the decree was recognized as valid in England because it appeared that it would be recognized in New York, if its validity were in question before a New York court.

It may be that in the *Armitage* case the English court had no jurisdiction (*h*), and that it was mistaken in finding that a New York court would have recognized the validity of the South Dakota decree (*i*), but there remains at least a considered decision of an English court that if the parties were

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(*g*) [1906] P. 135, Sir Gorell Barnes P.

(*h*) As submitted in the course of a learned and vigorous attack upon the case by Morris *Recognition of Divorces Granted Outside the Domicile* (1946), 24 Can. Bar Rev. 73, at p. 77.

(*i*) Morris, 24 Can. Bar Rev. at p. 78. See also Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 462, note 13.

domiciled in New York in the English sense (*j*) at the time of the making of a decree in South Dakota, and if the decree would be recognized as valid in New York, it should be recognized as valid in England. The principle of the decision is not affected by the fact that the English court may have erred in finding that the conditions of the applicability of the principle existed. It would seem to be immaterial upon what ground it was held by the English court that a New York court would have recognized the validity of the South Dakota decree (*k*). In any event there would seem to be no justification for saying that the English court held that the South Dakota court had jurisdiction or that the *Armitage* case is authority for the proposition stated by Dicey (*l*) in the first exception to his rule 99, as follows:

The courts of a foreign country where the parties to a marriage are not domiciled have jurisdiction to dissolve their marriage, if the divorce granted by such courts would be held valid by the courts of the country where at the time of the proceedings for divorce the parties are domiciled.

The doctrine of the *Armitage* case will not of itself avail to support in England (or Canada) the validity of a divorce decreed by the court of a country which is not that of the domicile, if the domicile of the parties is in England or in one of the provinces of Canada (*m*) or in any other country in which divorce jurisdiction is based upon domicile in the strict English sense, because the divorce in question would not be recognized by a court of the domicile.

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(*j*) According to the statement of facts, which was a part of the reasons for judgment, the English court found that the husband's domicile of origin was in New York and that there was nothing to show that he had changed that domicile, and that the inference from the facts proved was that at all material times he was domiciled in New York.

(*k*) Even if the English court erred in finding that a New York court would have held that a sufficient domicile in South Dakota was proved.

(*l*) Conflict of Laws (5th ed. 1932). I agree with Morris (1946), 24 Can. Bar Rev. at p. 81, that the case is not authority for Dicey's proposition, although, with respect, I am unable to agree with his reasons for this opinion.

(*m*) *In re Stirling*, [1908] 2 Ch. 344 (North Dakota divorce); *Re v. Brinkley* (1907), 14 O.L.R. 434 (Michigan divorce). If the decree is made in one of the provinces of Canada in accordance with the Divorce Jurisdiction Act, 1930, it would of course be valid in any other province of Canada; the question of its validity in England is discussed below.

The doctrine of the *Armitage* case might, however, oblige, or enable (*n*), a court in England or a province of Canada to recognize the validity of a decree made by a court of a country where the parties are not domiciled in at least some of the numerous cases in which the domicile is found to be in a state of the United States or in some other country where divorce jurisdiction is either not based upon domicile in the strict English sense or is not based upon domicile at all (*o*).

In the first place, the decree of a court of a state of the United States might be entitled to recognition in some foreign country on the basis of the nationality of the parties or some other circumstance, and therefore if the domicile is found to be in that foreign country, the decree might be entitled to recognition in England or Canada by reason of its being entitled to recognition in that foreign country. In the second place, if the divorce is decreed in a foreign country, such as France, and the domicile is found to be in a state of the United States, such as New York, and if the French decree would be recognized by a court of New York (*p*), it is also entitled to recognition in England or Canada. In the third place, if the divorce is decreed in a state of the United States and the domicile is found to be in another state of the United States, it will, more frequently than not, result that the decree made in the one state will be recognized in the other, and therefore will be entitled to recognition in England or Canada. This third class of cases is of great practical importance, not only in the United States, but also, by reason of *Armitage v. Attorney-General*, in England and Canada, and therefore deserves some further explanation in the present discussion.

Broadly speaking, in certain situations a court in one state of the United States is obliged under the Constitution of the United States to recognize a decree pronounced in another state, and there are other situations in which a court in one state will recognize a decree pronounced in another state, although

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(*n*) The doctrine would seem to be a beneficial one of which advantage should be taken by a court so as to reduce the number of cases in which parties are regarded as husband and wife in one country and not husband and wife in another.

(*o*) Cf. *Mezger v. Mezger*, [1937] P. 19: decree of a German court divorcing German nationals.

(*p*) See e.g., *Gould v. Gould* (1923), 235 N.Y. 14, 138 N.E. 490, criticized (1923), 36 Harv. L. Rev. 881, and defended in Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 463; cf. (1926), 39 Harv. L. Rev. 640.

not obliged under the Constitution to do so. In the latter class of cases no question of constitutional law is involved, and if the validity of the divorce is in issue in an English or Canadian court, the question is simply whether the court is convinced by sufficient evidence that the decree would be recognized by a court of the state of domicile. In the former class of cases the recognition of the decree by a court of the state of domicile is a question of constitutional law governed by certain decisions of the Supreme Court of the United States. This question is separately discussed in another chapter (q).

In some other situations the recognition of the validity of a divorce decree might depend upon the combined effect of the doctrine of *Armitage v. Attorney-General* and the Divorce Jurisdiction Act, 1930, already mentioned (r), by which the Parliament of Canada has empowered a wife, who has been deserted by her husband, to sue for divorce in the province in which the husband was domiciled at the time of the desertion, notwithstanding his subsequent change of domicile. If, for example, the parties are domiciled in the province of Ontario, and the husband deserts his wife and acquires a domicile in the province of Alberta, and she obtains a divorce in Ontario by virtue of the statute of 1930, the court of any other province would be obliged by the statute, without regard to the doctrine of *Armitage v. Attorney-General*, to recognize the jurisdiction of the Ontario court and consequently the validity of the decree. An English court would not, however, be bound by the Canadian statute, and its recognition of the Ontario decree would depend on the doctrine of *Armitage v. Attorney-General*. As the Ontario decree would necessarily be recognized by an Alberta court, and the Alberta court is the court of the husband's domicile, it follows that the decree is entitled to recognition in an English court. If, on the other hand, the husband, domiciled in Ontario, deserts his wife, and acquires a domicile in England, and the wife obtains a divorce in Ontario, the Ontario decree would of course be entitled to recognition in the court of any province of Canada, but whether it would be entitled to recognition in an English court is doubtful. An English court

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(q) See chapter 41.

(r) The text is quoted in § 5 of the present chapter, *supra*. Various situations are discussed in Read, *The Divorce Jurisdiction Act, 1930* (1931), 9 Can. Bar Rev. 73, and in Johnson, *Conflict of Laws*, vol. 2 (1934) 95 ff.; cf. Read, *Recognition and Enforcement of Foreign Judgments* (1938) 221 ff.

might recognize its validity on the ground that the jurisdiction conferred on the Ontario court by the statute of 1930 is analogous to the jurisdiction conferred on an English court by the statute of 1937, and that an English court ought therefore to recognize the validity of a decree made by an Ontario court in similar circumstances to those in which an English court would have jurisdiction (*s*). On a strict view of the law, however, an English court, which is of course not bound by the Canadian statute, might refuse to recognize the validity of the Ontario decree (*t*). In that event what is required is reciprocal legislation in the United Kingdom and in the other units of the British Empire, providing for recognition in one unit of a decree made in another unit by virtue of analogous statutes enabling a deserted wife to sue for divorce in the country where her husband was domiciled immediately before the desertion (*u*).

It has sometimes been suggested that the doctrine of *Armitage v. Attorney-General* is an example of the application of the doctrine of the *renvoi* (*v*). It is submitted, however, that the doctrine of the *Armitage* case relates only to the jurisdiction of courts, whereas the doctrine of the *renvoi* relates to the meaning to be assigned to a reference by a conflict rule of the law of the forum to the law of a foreign country (*w*), and that it is not helpful to confuse the two doctrines. It is true that when a court recognizes a foreign divorce on the basis of the jurisdiction of a foreign court, it thereby gives effect to a foreign law of divorce, but this result is not peculiar to situations to which the *Armitage* case applies; the result is the same when a court recognizes a foreign divorce on the ground that the foreign court is a court of the domicile (*x*).

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(*s*) As submitted by Wickens in *Recognition of Foreign Divorces—Domicile* (1945), 23 Can. Bar Rev. 244, at p. 247.

(*t*) As submitted by Tuck, 23 Can. Bar Rev. at p. 245.

(*u*) Cf. Read, *Recognition and Enforcement of Foreign Judgments* (1938) 231; Morris, *Recognition of Divorces Granted Outside the Domicile* (1946), 24 Can. Bar Rev. 73, at p. 83.

(*v*) I have to plead guilty to having so described the doctrine of the *Armitage* case: cf. [1942] 4 D.L.R. 44.

(*w*) Fully discussed in chapters 7, 8 and 9.

(*x*) An analogous case is one in which a court entertains an action upon a foreign judgment *in personam* and, having found that the foreign court had jurisdiction, gives judgment in favour of the successful litigant in the foreign court without (apart from well-known exceptions) retrying the case on the merits and without regard to the question what law the foreign court applied. The subject is

(c) *Divorce Effected without a Court Decree or without Notice.*

The case of *Nachimson v. Nachimson* (a), and the Soviet Russian law therein stated, will doubtless raise at some future time the further question whether a divorce effected in Soviet Russia or under Soviet Russian law is entitled to recognition in England or in the provinces of Canada (b). In the *Nachimson* case the expert witnesses who gave evidence before the English court were not in agreement as to the validity by Soviet Russian law of the attempted dissolution of the marriage, and the English court did not decide this question. The question of the validity in England of a divorce effected under Soviet Russian law may arise in a future English case, but only if the husband is domiciled at the time of the alleged divorce, in Soviet Russia or in some country having a similar law of divorce, and the divorce is alleged to be effected in the country of his domicile or is alleged to be entitled to recognition in the courts of that country; and it is immaterial what is the place of celebration of the marriage, what the domicile of the parties is at that time, or what the nationality of the parties is either at that time or at the time of the alleged divorce.

The question divides itself into two branches, namely, whether an English court will recognize (1) a divorce effected by the mere registration of a declaration of the parties, without the decree of any court, or (2) a divorce effected by the mere registration of a declaration by one of the parties, or by a decree of a court obtained upon the application of one of the parties, without notice to the other party and without the other party having any opportunity to object or to show cause why the divorce should not be effected.

The English decisions have as yet gone only to the extent of holding that the decree of a court of the husband's domicile, or the decree of a court which would be recognized as valid by

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fully discussed in Read, *Recognition and Enforcement of Foreign Judgments* (1938) 271 ff.

(a) [1930] P. 217. This case is discussed in § 13(a) of the present chapter, *infra*, as regards the original validity of the marriage.

(b) As there would appear to be no difference between the law of England and the law of the provinces of Canada in this matter, it will be simpler to speak merely of the probable views of an English court.

the court of the husband's domicile (*c*), will be recognized as valid in England; and that the grounds for making the decree may be merely those required by the domestic rules of the foreign law, and need not be grounds which would support a decree made by an English court if it were the court of the domicile. If, however, the ground of the decree of the foreign court is simply that by the *lex fori* one of the parties has dissolved the marriage, so that the decree is merely a judicial ascertainment of the declaration of one of the parties or simply a registration of that declaration, it is not clear that an English court will recognize the validity of the decree (*d*). In other words, the question whether a divorce decreed by a court under the Soviet Russian law as it existed before 1927 (*e*), would be entitled to recognition in England is open to doubt, though it is submitted that the question should be answered affirmatively, in accordance with the general rule that the grounds upon which a foreign court decrees divorce are immaterial provided that the court has jurisdiction.

Under the later Soviet Russian law a court order is unnecessary in any case, as before 1927 it was unnecessary in the case of a divorce by mutual consent of the parties, and the further question will doubtless arise whether a divorce effected in accordance with the law of the domicile but without any court order is entitled to recognition in England. An affirmative answer to this question must be even more hazardous (*f*) than a similar answer to the preceding question, but it is submitted that a divorce effected by mutual consent in the country of the domicile and in accordance with the law of that country should be recognized in England. If, however, the divorce is effected

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(*c*) See *Armitage v. Attorney-General*, [1906] P. 135, in § 6(b), *supra*.

(*d*) *Rex v. Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634, at p. 642. Viscount Reading C.J.

(*e*) As stated in *Nachimson v. Nachimson*, [1930] P. 277, in § 13(a) in the present chapter, *infra*.

(*f*) *Rex v. Hammersmith, supra*. That case was, however, essentially different, because there the Mohammedan law under which the husband purported to declare himself and his wife divorced was merely his personal religious law and was not the territorial law of the country of his domicile, India. His statement that there was no court in India possessing jurisdiction to decree divorce was treated as fatal to the recognition of his divorce in England, notwithstanding that, as he was not domiciled in England, the English court had no jurisdiction to decree divorce in his case, so that he was left without any remedy other than that provided by Mohammedan law.

by the declaration of one party its recognition in England would seem to be open to the objection next to be discussed.

It has been held that the decree of a foreign court, even though it be a decree of the court of the husband's domicile, is not entitled to recognition in England if it is obtained by one party without notice to the other party and without the other party having any opportunity to show cause why the divorce should not be decreed (*g*). If this view is right, then *a fortiori* it would seem that a divorce effected without any court decree by the mere declaration of one of the parties should not be entitled to recognition in England.

The foregoing discussion has been confined to the dissolution of marriage as understood in Christendom, or marriage in the English sense. A polygamous or other union which is not entitled to recognition as marriage, strictly speaking, is entitled to some kind of recognition, or recognition for some purposes, in England (*h*), and it is possible that the dissolution of the status created by such marriage may likewise be effected in accordance with its proper law so as to be entitled to recognition in England (*i*).

## § 7. Annulment Jurisdiction and Proper Law; Canonical and Civil Impediments.

Divorce is the dissolution of an originally valid marriage, and the chief questions of the conflict of laws requiring discussion are matters of the jurisdiction of courts to grant divorce, and of the principles governing the recognition of foreign divorces, such recognition also depending to a large extent upon the jurisdiction of courts (*a*).

The topic of annulment of marriage, on the other hand, involves not only matters of the jurisdiction of courts, but also matters of the conflict of laws in the strict sense, including the characterization of the question or questions, and the selection and application of the proper law or laws (*b*) governing the

(*g*) *Rudd v. Rudd*, [1924] P. 72; *Delaporte v. Delaporte*, [1927] 4 D.L.R. 933, 61 O.L.R. 302; *Bavin v. Bavin* [1939] O.R. 385, [1939] 2 D.L.R. 278, 3 D.L.R. 328.

(*h*) See § 13(c) of the present chapter, *infra*.

(*i*) *Rex v. Hammersmith*, [1917] 1 K.B. 634, at p. 642.

(*a*) See §§ 4, 5 and 6 of the present chapter, *supra*.

(*b*) As to characterization, selection and application generally, see chapters 3, 4, 5 and 6.

original validity of a marriage. In England, as pointed out in an earlier section (c), the jurisdiction to decree annulment of marriage was before 1857 vested solely in the ecclesiastical courts, and the law as to the validity of a marriage was to a large extent ecclesiastical or canon law. The so-called "impediments" to marriage were either canonical or civil (d). The canonical impediments included (1) impotence, and (2) consanguinity or affinity of the parties, of which the second was in 1835 made a civil impediment by statute (e). The civil impediments were (1) a prior existing marriage, (2) unsoundness of mind, (3) nonage and (4) lack of essential formalities of solemnization.

A civil impediment rendered a marriage void *ab initio*. Although only an ecclesiastical court had jurisdiction to entertain a suit for a declaration of nullity of the marriage, a civil court might, as mentioned in an earlier section (f), incidentally find the marriage to be void if its validity was in issue in an action or proceeding which the court had jurisdiction to entertain. A canonical impediment rendered a marriage voidable, not void, and the consequence was that until the marriage was annulled by the only court which had jurisdiction to annul it, namely, an ecclesiastical court, its validity was unimpeachable in a civil court. If a decree of nullity was made by an ecclesiastical court it operated retroactively so as to render the marriage void *ab initio* (g), but if the death of either of the parties occurred before the marriage was annulled, an ecclesiastical court was not permitted thereafter to annul the marriage, because the only effect of an annulment would have been to bastardize the issue, and consequently the marriage became unimpeachable in any court (h).

In England in 1857 the matrimonial jurisdiction of the ec-

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(c) See § 2 of the present chapter, *supra*.

(d) See 17 Encyclopaedia Britannica (11th ed. 1910-1911) 756 ff.; 16 Halsbury, Laws of England (2nd ed. 1935) 560, 561; Eversley, Law of the Domestic Relations (5th ed. 1937) 20-47. According to Halsbury lack of assent resulting from mistake or duress renders a marriage void, whereas according to Eversley the marriage is merely voidable.

(e) See § 9 of the present chapter, *infra*.

(f) See § 2 of the present chapter, *supra*.

(g) *Newbould v. Attorney-General*, [1931] P. 75. The facts are stated and the case is discussed in chapter 42.

(h) See notes (k), (l) and (m) in chapter 42.

clesiastical courts was transferred to a new civil court (*i*). In the provinces of Canada similar jurisdiction is exercised by the superior courts of the provinces. Apart from the province of Quebec, in which the jurisdiction of the provincial courts has an independent source in the Civil Code of Lower Canada, the provincial courts, like the High Court of Justice in England, have succeeded to the jurisdiction of the English ecclesiastical courts, and with that jurisdiction, have succeeded to the law formerly administered by those ecclesiastical courts, subject of course, as to both jurisdiction and law, to modifications effected by statute (*j*).

As regards the proper law governing various grounds of nullity of marriage, or impediments rendering a marriage void or voidable, the requirements as to formal validity or formalities of celebration are governed by the law of the place of celebration (*k*), whereas, broadly speaking, the law of the domicile of the parties governs their capacity to marry, including questions of prohibited degrees of consanguinity or affinity (*l*), impotence, unsoundness of mind, and nonage. Whether a requirement of parental consent to the marriage of a minor is to be characterized as a matter of capacity to marry or as a matter of formalities of celebration is separately discussed (*m*). If the ground of nullity of a marriage is a prior existing marriage of one of the parties, the validity of the prior marriage must be decided on the same principles, that is to say, the prior marriage must have been originally valid, not void *ab initio*, or, if voidable, must not have been subsequently annulled by a competent court, and in any event must not have been subsequently dissolved by a valid divorce decree.

If it is assumed that a court of a given country has general jurisdiction to entertain suits for annulment of marriage, the next question is what is the criterion of the court's jurisdiction with regard to a specific marriage or with regard to specific parties. The case of a voidable marriage being left for subsequent consideration, the discussion will be simplified if it is

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(i) See § 2 of the present chapter, *supra*. The jurisdiction is now exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice.

(j) See § 3 of the present chapter, *supra*.

(k) See § 10 of the present chapter, *infra*.

(l) See § 9 of the present chapter, *infra*.

(m) See chapter 4, §§ 1 and 2.

confined in the first instance to the case of a marriage alleged to be void *ab initio*.

As stated by Dicey (*n*), in his rule 65, an English court has jurisdiction to annul a marriage:

- (i) Where the marriage was celebrated in England; or
- (ii) Where the respondent is resident in England, not on a visit as a traveller and not having taken up that residence for the purpose of the suit; or
- (iii) Where the parties to the marriage are domiciled in England.

As regards the first of these three bases of jurisdiction, English courts have sometimes exercised jurisdiction to entertain a suit for the annulment of a marriage celebrated in England, though neither of the parties was either domiciled or resident in England (*o*), but Westlake, while suggesting that the jurisdiction "may be justified for the sake of correcting the civil register of the country (*p*)" doubts whether the jurisdiction should be based, as it formerly was, on the principle that the *forum rei gestae* is competent as such, the analogous jurisdiction in contract of the *forum contractus celebrati* having been abandoned in England. Bentwich, in later editions of Westlake (*q*), doubts whether jurisdiction will any longer be entertained on the ground merely of the celebration of the marriage in England (*r*).

As regards the third basis of jurisdiction it is clear that the court of the common domicile of the parties has jurisdiction to annul a marriage (*s*).

As regards the second basis of jurisdiction, Westlake, Private International Law, says:

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(*n*) Conflict of Laws (4th ed. 1927). As will be noted later in the present § 7, in the fifth edition of Dicey (1932) rule 65 (1927) became rule 65(1), and a new sub-rule 65(2) was added. The word "seemble" was also inserted at the beginning of clause (ii).

(*o*) See, e.g., *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67. As to this case, see § 11 of the present chapter, *infra*.

(*p*) Private International Law (5th ed. 1912), § 49.

(*q*) 6th ed. 1923, § 49; 7th ed. 1925, § 49a.

(*r*) *De Gasquet James v. Mecklenburg*, [1914] P. 53, cited by Bentwich, related to a declaratory judgment of validity, and is not strictly relevant to the present question. In Quebec it has been held that the mere fact that a marriage was celebrated there does not confer jurisdiction in annulment: *Main v. Wright*, Q.R. [1945] K.B. 105.

(*s*) *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, House of Lords, on appeal from Scotland. As to this case, see § 8 of the present chapter, *infra*.

§ 49. The jurisdiction of the English court in suits for a declaration of nullity of marriage . . . is sufficiently founded by the defendant's being resident in England, not on a visit or as a traveller, and not having taken up that residence for the purpose of the suit.

English courts have sometimes shown a tendency in undefended annulment cases to entertain petitions upon the sole basis of the petitioner's residence in England, at least in cases in which marriages are impeached as being void *ab initio*, as, for example, if they are alleged to be bigamous (*t*) or to have been procured by duress (*u*). On the other hand, courts in Manitoba and Ontario have applied Dicey's rule 65 as stating exclusively the possible grounds of jurisdiction. In *Hutchings v. Hutchings* (*v*) the Court of Appeal for Manitoba put the petitioner in an interesting dilemma. The petitioner, a man domiciled outside of Manitoba at the time of the marriage, but domiciled in Manitoba at the time of the suit for annulment, asked for a declaration of the nullity of the marriage as being bigamous. As it appeared that the marriage had not been celebrated in Manitoba and that the respondent was not resident there, the petitioner, by proving that the marriage was void *ab initio*, also proved that the respondent was not domiciled in Manitoba and that consequently the court had no jurisdiction to declare the marriage void. On the other hand, if he had failed to prove that the marriage was void, the suit would have been dismissed on the merits. Incidentally, however, the petitioner obtained a finding that the marriage was void as part of the court's reasons for declining jurisdiction.

The question of jurisdiction to annul a voidable marriage, reserved in the foregoing discussion, must now be considered. In the important case of *Inverclyde v. Inverclyde* (*w*) Bateson

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(*t*) See, e.g., *White v. White*, [1937] P. 111. For references to critical comments on this case, see chapter 42, note (*c*). As pointed out in that chapter, the *White* case was without any apparent justification, followed in *Easterbrook v. Easterbrook*, [1944] P. 10, a case of a voidable marriage.

(*u*) *Hussein v. Hussein*, [1938] P. 159. In this case, however, the marriage was celebrated in England, so that the jurisdiction of the court was not based solely on the petitioner's residence or domicile in England.

(*v*) (1930), 39 Man. R. 66, [1930] 4 D.L.R. 673, [1930] 2 W.W.R. 565. See also *Manella v. Manella*, [1942] O.R. 630, [1942] 4 D.L.R. 712, and comment by Hancock (1943), 21 Can. Bar Rev. 149. The marriage in the *Manella* case was alleged to be void *ab initio* by reason of the insanity of the woman.

(*w*) [1931] P. 29. The facts of the case are stated in the text relevant to note (*h*) in chapter 42 and a summary is there given of the grounds of the decision.

J. held that the annulment of a voidable marriage (specifically a marriage voidable on the ground of the man's impotence) is analogous to a decree of divorce, that is, a decree dissolving an existing marriage, and that the sole basis of jurisdiction is the same in both cases, namely, the domicile of the parties. The marriage being voidable, not void, the wife's domicile is necessarily that of her husband until the marriage is annulled (x). The *Inverclyde* case has been followed in Manitoba, Ontario and British Columbia (y), but in England, more recently, in undefended annulment suits, on at least two occasions, judges have expressed their dissent (z).

### § 8. Recognition of Foreign Annulment Decrees.

In an ideal system of conflict of laws the cases in which a court exercises jurisdiction should correspond exactly with the converse cases in which it recognizes the binding force of judgments rendered by foreign courts, but in practice it is common for the courts of one country to entertain actions in circumstances in which they would not admit that the jurisdiction is sufficiently founded to entitle the judgment of a foreign court, pronounced in relatively similar circumstances, to be recognized as internationally binding (a).

The question of the recognition of foreign declarations of nullity raise in fact difficult problems, the solution of which may depend, partly at least, upon the distinction between void and voidable marriages and other considerations discussed above.

In the case of *Ogden v. Ogden* (b), the impasse which confronted the woman may be shortly stated. She was a domi-

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(x) On this point, see also the discussion of *Ogden v. Ogden*, [1908] P. 46, in chapter 4, § 1, at p. 50, *supra*.

(y) *W. v. W.* (1934), 42 Man. R. 578, [1934] 3 W.W.R. 230; *Fleming v. Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90; *Shaw v. Shaw* (1945), 61 B.C.R. 40, [1945] 1 D.L.R. 413, [1945] 1 W.W.R. 156, but on appeal (1945), 62 B.C.R. 52, [1946] 1 D.L.R. 168, [1945] 3 W.W.R. 577, all that the Court of Appeal found it necessary to decide was that a court in British Columbia had no jurisdiction to annul a marriage on the ground of impotence if the petitioning wife was resident in the province, but the respondent was neither resident nor domiciled there, and the marriage had been celebrated elsewhere.

(z) See *Easterbrook v. Easterbrook*, [1944] P. 10, and *Hutter v. Hutter*, [1944] P. 95, discussed and criticized in chapter 42.

(a) See Westlake, *Private International Law*, chapter 10; cf. chapter 30, § 4, *supra*, pp. 534, 535.

(b) [1908] P. 46, already discussed from another point of view in chapter 4, § 1, at pp. 48 ff., *supra*.

ciled Englishwoman who was married in England, in English form, to a domiciled French citizen. Afterwards the marriage was annulled by a French court on the ground that the man had not obtained the consent of his father as required by French law, and the man subsequently married a Frenchwoman in France. The Englishwoman sued in England for divorce on the ground of adultery and desertion, but her suit was dismissed for want of jurisdiction, the man's domicile being French. She went through a form of marriage with a domiciled Englishman, who subsequently sued in England for a declaration of nullity of this second marriage. The court made the declaration of nullity, on the ground that the first marriage was valid and subsisting in England, and that the French decree of nullity was not binding in England; and doubtless the result would have been the same if it had been the woman who had asked for a declaration of nullity of the first marriage. She was not the wife of her first husband in France, but was his wife in England. She was not entitled to either a divorce or a declaration of nullity in England. She was not entitled to a divorce in France because by French law she was not a wife, and the refusal of the English court to recognize the French decree of nullity deprived her of the only possible issue out of the impasse. The woman in a case like this has "been caught by a complex of rules of law, each of them not unreasonable, but, when fused together, producing hardship," and "clearly a remedy is required for this situation" (c).

On the assumption that the marriage in *Ogden v. Ogden* was void *ab initio* by French law (d), the problem was perhaps in-

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(c) See especially an article by Hughes on Judicial Method and the Problem in *Ogden v. Ogden* (1928) 44 L.Q. Rev. 217, discussing logical, sociological and utilitarian methods of procedure by way of remedy, and advocating the extension of the principle of *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, to cover the situation now in question.

(d) Without making this assumption, Lord Phillimore in *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 669, described the problem as "almost insoluble." The author of the article cited in the last preceding note, without discussing the distinction between a void and a voidable marriage, says that the only solution is to concede to the woman a domicile acquired by the marriage and to abide by the logical consequences, whether or not the domicile is accompanied by cohabitation abroad. Admittedly "the hardship present when desertion is not accompanied by a foreign decree of nullity still awaits a solution for its alleviation." The solution suggested is approved by Johnson, *Conflict of Laws*, vol. 2 (1934) 250, 257.

soluble. In that event the woman did not acquire the French domicile of the man. She did not in fact reside in France. The alleged marriage did not take place in France. Therefore there was no ground upon which, from the orthodox English point of view, the decree of the French court should be considered internationally binding.

If, however, as seems to be reasonably certain, the marriage in *Ogden v. Ogden* was not void *ab initio*, but was voidable by French law, then the problem was not insoluble. A reasonable and just solution would be to hold that as the marriage was an existing marriage until annulled, the woman acquired by law the domicile of her husband, and therefore the French decree of nullity, being a decree of the court of the domicile of the parties changing their status, would be entitled to recognition in England.

The conclusions just stated may, it is submitted, be justified by deduction to be made from a comparison of *Salvesen or von Lorang v. Administrator of Austrian Property* (e) with *Inverclyde v. Inverclyde* (f), although neither of these cases involved the situation which arose in *Ogden v. Ogden*, namely, that of a supposed marriage between a man domiciled in one country and a woman domiciled in another country. In the *Inverclyde* case the parties were domiciled in Scotland and the English court declined to entertain a suit for the annulment of their marriage, because the marriage was in the circumstances not void, but merely voidable, and as the effect of the declaration of nullity, if made, would be to dissolve an existing marriage, the courts of the domicile had exclusive jurisdiction. Conversely, it may be taken for granted that a declaration of nullity made by a court of the domicile would be recognized in England; and on the same principle, if the marriage in *Ogden v. Ogden* was not void but merely voidable, the decree of nullity of the French court, being the court of the domicile, should have been recognized in England.

The case of a marriage not merely voidable, but void, and declared void by a court of the common domicile of the parties arose in the *Salvesen or von Lorang* case. In 1897 a woman

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(e) [1927] A.C. 641.

(f) [1930] P. 29, already cited in § 7 of the present chapter, *supra*; and discussed in chapter 42. The argument which follows in the text is independent of the question whether the *Inverclyde* case is right in deciding that the domicile of the parties is the sole basis of jurisdiction in the case of a voidable marriage.

domiciled in Scotland, and a British subject, was married in Paris to an Austrian subject, and after the marriage the parties settled in Germany. In 1924, upon the wife's application, a German court, being the court of the domicile of the parties, declared the marriage void because of non-compliance with the formalities required by French law. It was held by the House of Lords, on appeal from the Court of Session in Scotland, that the German declaration of nullity was entitled to recognition in Scotland.

The judgments in the *Salvesen or von Lorang* case contains some dicta in favour of the competence, and even of the exclusive competence, of the courts of the domicile of the parties to make a declaration of nullity, but, it is submitted, these dicta must be limited in their application. They apply, of course, to the situation actually before the court, namely, that of a void marriage between persons both of whom, at the time of the making of the decree and regardless of the original validity of the marriage, are domiciled in the country in which the decree is made. The dicta would also apply, in accordance with the broad principle of the decision, to a case like the *Inverclyde* case if the suit had been brought in Scotland instead of England, or to any case of a voidable marriage where the husband is domiciled at the time of the making of the decree in the country in which the decree is made, the domicile of the wife before the marriage being immaterial because during the existence of the marriage her husband's domicile would necessarily be hers. It would seem, however, that the dicta would not cover the case of a marriage void *ab initio* between a man domiciled at the time of the making of the decree of nullity in the country in which the decree is made and a woman who was at the time of the marriage domiciled elsewhere and who has not at the time of the making of the decree acquired a domicile in the country in which the decree is made independently of the mere attribution to her of the man's domicile by virtue of the supposed marriage (*g*). Consequently the case of *Ogden v. Ogden* would not be affected, if it is assumed that the marriage in that case was void *ab initio*, but would be affected if, as was almost certainly the case, the marriage was merely voidable. The case of *Simonin v. Mallac* (*h*) should, how-

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(*g*) *A fortiori*, the foreign decree would not be entitled to recognition if it is the woman only who is domiciled in the country in which the decree is made, the man being domiciled elsewhere.

(*h*) (1860), 2 Sw. & Tr. 67; see § 11 of the present chapter, *infra*.

ever, have been decided differently, if the suit for nullity in England had been based, as it apparently was not (*i*), upon the French decree of nullity. Both parties being admittedly domiciled in France, and having gone to England in order to avoid the necessity of complying with the requirements of French law, the French decree of nullity was entitled to recognition in England (*j*).

The matters just discussed are of especial interest in Canada because some of the situations which have arisen between France (or some other foreign country) and England have also arisen between Quebec and Ontario. The law of Quebec as to marriage and causes for annulment of marriage resembles the law of France in some respects, and it sometimes happens that a marriage is annulled in Quebec (for example, because of lack of consent of parents) in circumstances in which a similar marriage would not be annulled in Ontario. If the view stated above is right, namely, that in situations such as occurred in *Simonin v. Mallac* and *Ogden v. Ogden* an English court would now recognize the French decrees of nullity, the adoption by an Ontario court of the same attitude towards Quebec decrees of nullity would avoid in some cases at least the scandal of parties being regarded as married in Ontario, but not married in Quebec (*k*). There would remain some cases, however, in which on the principles already discussed there would be no solution of the conflict between the laws of the two provinces.

It is to be observed that the English courts have only gone so far as to say that a decree of nullity actually made by the court of the domicile is entitled to recognition in England, and that they have not yet said that the decree of a court which is not that of the domicile is entitled to recognition in England merely because the decree would be recognized by the court of the domicile (*l*).

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(*i*) Cf. *Salvesen or von Lorang v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 669.

(*j*) In similar circumstances a French decree appears to have been recognized in England, upon an undefended petition by the wife for a declaration of nullity, in the case of *De Massa v. De Massa*, reported only in *The Times* (London), 31st March, 1931, and noted in (1932), 48 L.Q. Rev. 13. This case was followed in *Galene v. Galene*, [1939] P. 237, on which see comment (1940), 56 L.Q. Rev. 20.

(*k*) See chapter 4, § 1, note (*e*), p. 49, *supra*.

(*l*) On the other hand the English courts have said that a decree of divorce made by a foreign court is entitled to recognition in England if it would be recognized by the court of the domicile. See § 6(b) of the present chapter, *supra*.

### § 9. Prohibited Degrees and Capacity to Marry.

In an earlier chapter (*a*) I have discussed capacity in the conflict of laws, and have stressed the point that a question of capacity cannot be characterized in the abstract as a single question governed by a single law, and that capacity to marry, capacity to make a marriage contract or settlement, capacity to make a commercial contract, and capacity to succeed to property on the owner's death, and so on, are different questions which may be governed by different conflict rules. In the present chapter we are concerned only with capacity to marry, and it may be stated as a general rule that in English conflict of laws capacity to marry is governed by the law of the domicile.

Formerly consanguinity or affinity was a canonical impediment, rendering a marriage voidable by decree of an ecclesiastical court during the lifetime of both parties (*b*). In this respect the law was changed in England by the Marriage Act, 1835 (5 & 6 W. 4, c. 54), commonly called Lord Lyndhurst's Act, which begins with the following recital:

Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable.

After a provision (*s. 1*) validating marriages between persons within the prohibited degrees of affinity celebrated before the passing of the statute, the statute provides as follows:

2. All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever.

Lord Lyndhurst's Act was formerly not in force in Upper Canada (Ontario), and therefore a marriage between a man and the sister of his deceased wife, celebrated in 1850, was unimpeachable after his death in 1856 (*c*). The statute was, however, brought into force in Ontario by the Divorce Act (Ontario), 1930, which provided that the law of England as

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(*a*) Chapter 31, § 2.

(*b*) See § 7 of the present chapter, *supra*.

(*c*) *Hodgins v. McNeil* (1862), 9 Gr. 305.

to the annulment of marriage as it existed on the 15th July, 1870, should be in force in Ontario, and it is in force in those provinces of Canada in which the law of England was adopted subsequently to 1835 (*d*). The effect of the statute in England was that consanguinity or affinity within the prohibited degrees ceased to be a canonical impediment cognizable only in an ecclesiastical court, and became a civil impediment cognizable in ecclesiastical and civil courts alike, though until 1857 it continued to be the law in England that only an ecclesiastical court had jurisdiction to entertain a suit for a declaration of nullity, whereas in a civil court the question of the validity of the marriage could be decided only as an incident in a proceeding in which the civil court had jurisdiction on other grounds to entertain (*e*).

The statute did not make any change in the law which defined the prohibited degrees (*f*). That law was still to be found in certain statutes of Henry VIII, as construed by the courts. The statute 25 H. 8, c. 22, specified and prohibited certain marriages which were "plainly prohibited and detested by the laws of God," and the statute 28 H. 8, c. 7, specified and prohibited them in similar terms. These statutes were subsequently repealed, but the statute 28 H. 8, c. 16, referred to marriages "prohibited by God's laws, limited and declared" in 28 H. 8, c. 7, "or otherwise by Holy Scripture;" and the statute 32 H. 8, c. 38, referred to marriages contracted between lawful persons, that is, not prohibited by God's law to marry each other, and enacted that "no reservation or prohibition, God's law except, shall trouble or impede any marriage without the Levitical degrees." The net result of the statutes 2 & 3 Ed. 6, c. 23, 1 Ph. & M. c. 8, and 1 Eliz. c. 1, was that the statutes 28 H. 8, c. 16, and 32 H. 8, c. 38 (as amended by 2 & 3 Ed. 6, c. 23) remained in force, but neither of these statutes contained any positive prohibition against marriage within the prohibited degrees; only an ecclesiastical court had jurisdiction to entertain a suit for annulment, and recourse was to be had to the repealed statute 28 H. 8, c. 7, for the definition of "God's law" on the subject.

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(*d*) See § 3 of the present chapter, *supra*.

(*e*) See § 2 of the present chapter, *supra*.

(*f*) *Reg. v. Chadwick* (1847), 11 Q.B. 173, 75 R.R. 313 (and preface), 2 Cox C.C. 381; *Brook v. Brook* (1861), 9 H.L.C. 193, 5 R.C. 783.

In other words the legislation of Henry VIII (1) defined the prohibited degrees in accordance with a somewhat imaginative construction of the Levitical law (*g*), and (2) repealed the Roman canon law which prevailed in England before the Reformation (*h*), so far as it prohibited marriages outside of the supposed Levitical degrees (*i*).

As between two countries, both of which adopt domicile as a connecting factor with regard to capacity to marry, the situation is superficially simple. That is to say, a marriage valid in one country will be valid in the other, and a marriage invalid in one will be invalid in the other, regardless of the place of celebration of the marriage and of the nationality of the parties. As between a country adopting domicile, and a country adopting nationality, as the criterion of capacity, there may be irreconcilable conflict.

Even in English law complications of various kinds arise. The judgment of the Court of Appeal in *Sottomayor v. De Barros* (No. 1) (*j*), which contains the broad statement that

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(*g*) For example, the prohibition against the marriage of a man with his deceased wife's sister is not supported by the text of the 18th chapter of Leviticus: *cf.* Falconbridge, *Marriage with a Deceased Wife's Sister* (1908), 28 Canadian L.T. 256, for references. This particular prohibition gave rise to some of the cases herein-after discussed, but both it and various other prohibitions have been abolished by later statutes both in England and in Canada. The complete table of prohibited degrees is set out in the English Book of Common Prayer; *cf. Rex v. Dibdin*, [1910] P. 57, affirmed *sub nom. Thomson v. Dibdin*, [1912] A.C. 533. In Canada the exceptions created by statutes of the Parliament of Canada passed at various times from 1882 on are now consolidated in the Statutes of Canada, 1932, c. 10, s. 1, which provides that a marriage is not invalid merely because the woman is a sister of a deceased wife of the man, or a daughter of a sister or brother of a deceased wife of the man, or merely because the man is a brother of a deceased husband of the woman, or a son of a brother or sister of a deceased husband of the woman. In England the exceptions are those stated in statutes of the United Kingdom passed in 1907, 1921 and 1931.

(*h*) As to the prevalence of the Roman canon law in England at least during the three centuries immediately preceding the Reformation, see Maitland, *Roman Canon Law in the Church of England* (1898) 2, 26 ff. 48 ff. For further references, see § 10, note (*a*), *infra*.

(*i*) The canonical prohibitions extended far beyond the degrees specified in Leviticus or in the legislation of Henry VIII. For a statement of the main rules of the canon law, see 2 Pollock & Maitland, *History of English Law before the Time of Edward I* (2nd ed. 1898) 385-389; *cf.* 17 *Encyclopaedia Britannica* (11th ed. 1910-1911) 754-755.

(*j*) (1877) 3 P.D. 1.

capacity to marry is governed by the *lex domicilii*, contains a limiting statement that a marriage is invalid on the ground of incapacity by the *lex domicilii* only if both parties are incapable by their domiciliary law or their respective domiciliary laws; and advantage was taken of this limitation of the application of the *lex domicilii* when on a subsequent hearing of the same case, *Sottomayer v. De Barros* (No. 2) (*k*), it was found that the woman was domiciled in Portugal and by Portuguese law, the parties, being first cousins, were prohibited from marrying without papal dispensation, but that the man was domiciled in England and the marriage was not prohibited by English law; and the marriage, which had been celebrated in England, was held to be valid in England.

On the basis of these two cases we might be justified in stating broadly that if both parties are incapable of marrying by the *lex domicilii*, the marriage will be declared void in England, no matter where the marriage was celebrated, but that if one party is capable, and the other party is not capable, by the *lex domicilii*, an English court will simply apply the *lex loci celebrationis*.

The proposition just stated does not, however, accord with the results reached in two earlier English cases, namely, *Brook v. Brook* (*l*) and *Mette v. Mette* (*m*). In each case the marriage was celebrated abroad. In *Brook v. Brook* both parties were British subjects domiciled in England and, as the woman was the sister of the deceased wife of the man, their marriage was prohibited by the then law of England (*n*), but was permitted by the law of Denmark, where the marriage was celebrated. The marriage was held to be void in England (*o*). In *Mette v. Mette* the man was a British subject domiciled in England and married at Frankfort his deceased wife's sister, a native of Frankfort and domiciled there. The marriage was valid by the *lex loci celebrationis*, but was held to be void in England. Moreover, in both cases the court laid some stress

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(*k*) (1879) 5 P.D. 94.

(*l*) (1861) 9 H.L.C. 193.

(*m*) (1859) 1 Sw. & Tr. 416.

(*n*) The law of England was changed in this respect in 1907. In Canada the law had already been changed so long ago as 1882.

(*o*) Assuming that a Danish court would apply the same principle, the marriage should also have been regarded as void in Denmark, whereas in the converse case of both parties being domiciled in Denmark, the marriage should be held to be valid both in England and in Denmark.

upon the nationality of both parties in one case and of the man in the other case, although later English cases have made it plain that domicile, not nationality, is the criterion in English law for the purpose of the prohibited degrees of consanguinity or affinity (*p*). In neither case did the court speak of incapacity. In *Mette v. Mette* the court said that the man, as a British subject, owed obedience to the British statute and could not contract marriage in contravention of it; and in *Brook v. Brook* the court used stronger language, describing the marriage as "contrary to God's law" as defined by statute and therefore one that the court was bound to declare void, at least if the parties were British subjects domiciled in England, and the case was treated as being different from a case of mere incapacity.

Plainly, if there is no illegality and no incapacity by the *lex loci celebrationis* or by the territorial law of the domicile of either party, but merely a religious incapacity of one party by reason of his membership in a particular caste or religious community, or an incapacity of one party of which he can rid himself at will, the marriage will be held valid by an English court (*q*).

Until the year 1939 the discussion of the English cases might have stopped at this point, but the case of *In re Paine, In re Williams* (*a*) necessitates a reconsideration of the whole topic. In that case Mrs. Williams, who died in 1884, had by her will, made in 1883, directed that the sum of £250 (part of a trust fund settled on her under the will of her father, Thomas Paine) should be held by her trustees upon trust to pay the interest, dividends and proceeds arising from the investments, as and when received, to her daughter Ada Paine Toepfer, during her life for her sole and separate use and benefit, independent of the debts, control or engagements of any husband, and in case her daughter should have any child or children who should be living at the time of her daughter's decease, on trust as to the principal sum of £250 for her daughter (Ada Paine Toepfer), her executors, administrators and assigns absolutely,

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(*p*) *In re De Wilton*, [1900] 2 Ch. 481; *In re Bozell's Settlement*, [1902] 1 Ch. 751.

(*q*) *Chetti v. Chetti*, [1909] P. 67; *Papadopoulos v. Papadopoulos*, [1930] P. 55.

(*a*) [1940] Ch. 46, a case decided July 25, 1939. The rest of the present § 9 reproduces in substance my comment on this case, published (1940), 18 Can. Bar Rev. 220-224.

with a gift over in case her daughter should die without leaving any child or children her surviving. Ada Paine, domiciled in England, had in 1875 gone through the form of marriage with Franz Robert Toepfer, formerly husband of her deceased sister, at Frankfort-on-Main, in Prussia, where Toepfer was domiciled, and had left, her surviving, children of this marriage. Bennett J. held that there was no context in the will showing that Mrs. Williams had in mind the child or children, legitimate or illegitimate, of Ada Paine's marriage with Toepfer, and therefore, that the testatrix had in mind only the legitimate child or children, and consequently it was necessary to decide whether Ada Paine and Toepfer were married (*b*). By the domestic law of her domicile, as it then stood, the marriage was invalid, whereas by the domestic law of his domicile the marriage was valid, and the question was of course whether English conflict rules would in these circumstances give effect to the prohibition of English domestic law, or, in other words, whether in an English court the marriage would be declared void by reason of the incapacity of one only of the two parties. It was held by Bennett J. that the marriage was a nullity, and that the gift over took effect.

It being premised that if at the time of the marriage both parties are by their domiciliary law or laws incapable of marrying each other because they are within the prohibited degrees of consanguinity or affinity, their intermarriage, wherever celebrated, is a nullity (*c*), a more difficult question is what is the

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(*b*) On this point the case of *In re Loveland*, [1906] 1 Ch. 542, was cited in argument, but not in the judgment. The rule applied is that the "plain meaning" of the will (that is, in the particular case, that the testator meant legitimate children) cannot be disturbed by extrinsic evidence of the testator's intention. This rule is criticized by Warren, *Interpretation of Wills: Recent Developments* (1936), 49 Harv. L.R. 689; *cf.* J.K.G., "Plain Meaning" Rule (1939), 17 Can Bar Rev. 139. The rule, as applied in order to exclude from the description of "legitimate" or "lawful" children a child adopted under the law of the foreign domicile of the adopter, is criticized by C.A.W. in a comment (1928), 6 Can. Bar Rev. 729, on *In re Donald, Baldwin v. Mooney*, [1929] S.C.R. 306, (1929) 2 D.L.R. 244—a comment written before the Supreme Court of Canada had affirmed the judgment of the Saskatchewan court. As to the status of an adopted child in the conflict of laws, see chapter 38.

(*c*) *Brook v. Brook* (1861), 9 H.L.C. 193, 131 R.R. 123, 5 R.C. 783; *Sottomayor v. DeBarros* (No. 1) (1877), 3 P.D. 1, 5 R.C. 814, decided by the Court of Appeal on the assumption that both parties were domiciled in Portugal at the time of the marriage); *In re De Wilton*, [1900] 2 Ch. 481; *cf. In re Bozzelli's Settlement*, [1902] 1 Ch. 751 (marriage valid by the domiciliary law of both parties).

result if the parties are within the prohibited degrees by the domiciliary law of one party and outside the prohibited degrees by the domiciliary law of the other party. Before the decision in *In re Paine* there were two decisions the reconciliation of which was a fruitful source of controversy. In *Mette v. Mette* (d) Sir Cresswell Cresswell held void a marriage celebrated at Frankfort-on-Main in 1846 between a man domiciled in England (and naturalized in the United Kingdom by Act of Parliament) and his deceased wife's sister, domiciled in Frankfort, notwithstanding that "by the law of Frankfort" (e) the marriage was valid. In *Sottomayer v. DeBarros* (No. 2) (f) Sir James Hannen held valid a marriage celebrated in England between a man whom he found to be domiciled in England (g) at the time of the marriage and a woman domiciled at that time in Portugal. The parties were first cousins, and their intermarriage was valid by the law of England but prohibited, in the absence of a papal dispensation, by the law of Portugal. Various possible grounds of distinction between these two cases might be suggested, more or less plausibly. These grounds will be mentioned *seriatim*, in the form of theories which might be adopted by an English court in dealing with a case in which there is a conflict between the respective domiciliary laws of the parties, one law prohibiting, the other law permitting, the marriage in question.

(1) An English court might regard as more important the law of an English domicile than the law of a foreign domicile, so that effect will be given to a prohibition of English law although the foreign domiciled party is not prohibited from marrying by his or her domiciliary law, while conversely effect will not be given to a foreign prohibition if the English party is not prohibited from marrying by his or her domiciliary law. It may be observed at once that this ground of distinction between the two cases is unworthy of a place in a respectable system of the conflict of laws, which, it is submitted, should attempt to deal with converse situations according to a single

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(d) (1859) 1 Sw. & Tr. 416.

(e) Frankfort-on-Main, situated in the Prussian province of Hesse-Nassau, was one of the "free cities" of Germany from 1815 until 1866, when it was incorporated in the Prussian state.

(f) (1879) 5 P.D. 94, 5 R.C. 814, 818.

(g) The case had been remitted by the Court of Appeal to the Probate Division in order that certain facts, including the domicile of the parties, should be determined.

principle, without showing undue partiality for the domestic law of the forum or for a domestic party.

(2) An English court might regard the prohibition of English law as rendering the marriage illegal, immoral and incestuous — “plainly prohibited and detested by the laws of God” as it was described in the statute 25 Henry VIII, c. 22 — and regard the prohibition of a foreign law as merely creating incapacity. This is of course only a disguised way of restating theory (1), and in view of the fact that English courts have changed their attitude with regard to marriages within the prohibited degrees, treating them no longer on the basis of illegality, but on the basis of incapacity to marry governed by the law of the domicile of the parties (*h*), and in view of the fact that the marriage in question in *Mette v. Mette* would be a valid marriage if celebrated today between two parties domiciled in England, no excuse is left for treating the marriage as illegal, immoral or incestuous. One might have been tempted, apart from the case of *In re Paine*, to say that *Mette v. Mette* is no longer of authority.

(3) An English court might regard it as more important to uphold the validity of a marriage celebrated in England, in accordance with the domestic law of England, than to uphold the validity of a marriage celebrated abroad (*i*), or might apply the *lex loci celebrationis*, at least if the marriage is celebrated in England, in case of a conflict between the respective domiciliary laws of the parties. This theory would seem to be no less insular and no more respectable than theory (1).

(4) An English court might regard as more important the law of the husband's domicile than the law of the wife's domicile. The view advanced by Cheshire, that capacity to marry should be governed by the law of the matrimonial domicile, that is, “the law of the place where the husband immediately after the marriage retains” his domicile (*j*), seems clearly untenable, but something may be said in favour of the view that

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(*h*) See the cases cited in note (c), *supra*, in which the marriages were held to be valid or invalid respectively according as they were permitted or prohibited by the law of the domicile of the parties.

(*i*) In Halsbury, *Laws of England* (2nd ed.) vol. 6, p. 286, it is stated that if a marriage is celebrated in England between a party domiciled in England and capable by English law and a party domiciled abroad and incapable by his or her domiciliary law, the marriage is valid. Cf. Cheshire, *Private International Law* (2nd ed. 1938) 228.

(*j*) *Private International Law* (2nd ed. 1938) 220.

predominant effect should be given to the law of the husband's domicile at the time of the marriage. While the latter view involves the application of what may seem to be an arbitrary rule, nevertheless such a rule, if it were generally adopted as a ground of decision, would tend to uniformity of decision in different countries, a result which from a social point of view is highly desirable, so as to avoid the scandal of parties being husband and wife in one country, and unmarried persons in another country (*k*).

(5) An English court might regard the absolute prohibition of English law (*Mette v. Mette*) as more important than the prohibition of Portuguese law which was subject to papal dispensation (*Sottomayer v. DeBarros*), and might even characterize the latter prohibition as being analogous to the provisions of articles 151 and 152 of the French Civil Code which were in question in *Simonin v. Mallac* (*l*), that is, a requirement of parental consent to the marriage of a son under thirty years of age, but over twenty-five years of age, a consent which might be dispensed with by the making of three monthly respectful and formal requests for the advice of the parents. The analogy is doubtful, and is inconsistent with the reasoning of the Court of Appeal in *Sottomayer v. DeBarros* (No. 1), although it was regarded with some favour by Hannen P. in *Sottomayer v. DeBarros* (No. 2). If the true view is that the requirements of parental consent contained in articles 151 and 152, as well as that contained in article 148, in question in *Ogden v. Ogden* (*m*), are both alike provisions relating to intrinsic validity of marriage (capacity or family law) and not provisions relating to formalities of celebration (*n*), the analogy would of course fail

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(*k*) Cf. Hughes, Judicial Method and the Problem of *Ogden v. Ogden* (1928), 44 L.Q. Rev. 217, at p. 226, cited in § 8 of the present chapter, *supra*; Savigny, System, vol. 8, § 379 (Guthrie's translation, 2nd ed. 1880, pp. 290-292), cited Dicey, Conflict of Laws (5th ed. 1932) 756, note (*g*), with the observation that Savigny would approve of *Mette v. Mette*, but "would hold that, if in that case the husband had been domiciled in Germany whilst the wife had been domiciled in England, the marriage ought to have been held valid by our courts."

(*l*) (1860) 2 Sw. & Tr. 67. As Brett L.J. observed in his dissenting judgment in *Niboyet v. Niboyet* (1878), 4 P.D. 1, at p. 18: "It may, having regard to the French law, if it was as stated, be at least doubtful whether the suit [*Simonin v. Mallac*] was well decided." In *Le Messurier v. Le Messurier*, [1895] A.C. 517, the judgment of the majority of the court in *Niboyet v. Niboyet* was disapproved.

(*m*) [1908] P. 46.

(*n*) See chapter 4, § 1, at pp. 51-53, *supra*.

as a ground for distinguishing *Mette v. Mette* and *Sottomayer v. DeBarros* (No. 2).

(6) An English court might say that a marriage is void if either of the parties is by his or her domiciliary law incapable of marrying the other. This is not said in so many words in the *Paine* case, but this would appear to be the effect of the decision. The reasons for judgment were inexcusably inadequate, because there was no discussion of the earlier cases, and without even mentioning *Sottomayer v. DeBarros* (No. 2), Bennett J. simply held that the marriage was void "on the authority of *Mette v. Mette*, supported as it seems to be by the text book writers." From the "text book writers" he quoted Westlake, *Private International Law*, § 21, Halsbury, *Laws of England* (o), and a portion of rule 182 in Dicey, *Conflict of Laws* (p). It is interesting to note the implied approval of Westlake's persistent refusal to modify the wording of his § 21, notwithstanding the judgment of the Court of Appeal in *Ogden v. Ogden* (q), in which, to say the least, doubt was cast on the applicability of the law of the domicile to capacity to marry.

## § 10. Formalities of Celebration.

At least during the three centuries immediately preceding the Reformation, the Roman canon law was the canon law of England and was the law which ecclesiastical courts in England applied to the decision of any matter upon which they were competent to decide in England (a).

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(o) (2nd ed. 1932), vol. 6, p. 288.

(p) (5th ed. 1932). Some reference to Dicey's rule 183 would seem to be required in order to make the quotation from rule 182 apposite.

(q) See notes (m) and (n), *supra*, and chapter 4, § 1, at p. 49, *supra*.

(a) See Maitland, *Roman Canon Law in the Church of England* (1898) 2 ff., 26 ff., 48 ff.; Maitland, *Collected Papers* (1911), vol. 3, p. 137; Holdsworth, *History of English Law*, vol. 1 (3rd ed. 1922) 582, 588 ff.; cf. Falconbridge, *Marriage with a Deceased Wife's Sister* (1908), 28 *Canadian Law Times* 256, at pp. 262 ff., 268 ff., giving many references to Maitland's book and contrasting Maitland's conclusions with the theory constructed by the parliament and the courts of England after the Reformation, namely, that before the Reformation only so much of the Roman canon law was in force in England, or was a part of English ecclesiastical law, as had been received and allowed by custom or consent within the realm. As to this theory, see, e.g. *Reg. v. Millis* (1844), 10 Cl. & Fin. 534, at pp. 678, 745; *Bishop of Exeter v. Marshall* (1867), L.R. 3 H.L. 17, at

At least from the twelfth century the subject of marriage belonged to the spiritual forum; the ecclesiastical courts had exclusive jurisdiction in matrimonial causes; they alone could make a declaration of nullity of a supposed marriage, and the common law had no doctrine of marriage (*b*). The common law had its own doctrine with regard to inheritance of real property on intestacy, excluding *pro tanto* the canonical doctrine as to the retroactive effect of the marriage of parents after the birth of a child (*c*), and there were cases in which a widow claiming dower, or a plaintiff in a possessory action, was in a better position at common law if a marriage had been duly solemnized *in facie ecclesiae* (*d*); but, generally speaking, the question of marriage or no marriage was governed entirely by canonical law (*e*). The many appeals about matrimonial matters which were taken from England to Rome, and a decretal of Alexander III (pope, 1159-1181) addressed to the Bishop of Norwich (*f*) preclude the possibility that the ecclesiastical courts in England had developed and maintained a schismatical law of their own on such a vital point as the form of celebrating marriage (*g*).

Pope Alexander III's decretal above mentioned demonstrates that by Roman canon law, and therefore by the law of England before the Reformation, a marriage *per verba de praesenti*, even without subsequent cohabitation, was valid, though no priest was present and there was no religious or other ceremony. This continued to be the Roman canon law until 1563, when the *Tametsi* decree of the Council of Trent expressly affirmed the existence of the old rule, but for the future enacted that the presence of a priest—the parish priest or some other priest with

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pp. 34, 35; 5 Encyclopaedia Britannica (11th ed. 1910-1911) 201, 202.

(*b*) 2 Pollock & Maitland, *History of English Law* (2nd ed. 1898) 374; Holdsworth, *op. cit.*, vol. 1, p. 621. See also § 2 of the present chapter, *supra*.

(*c*) See chapter 39.

(*d*) 2 Pollock & Maitland, *op. cit.*, pp. 377-384; Pollock, preface to 131 Revised Reports; Holdsworth, *op. cit.*, vol. 1, p. 622.

(*e*) 2 Pollock & Maitland, *op. cit.*, pp. 377-384; Pollock, preface to 131 Revised Reports; Holdsworth, *op. cit.*, vol. 1, p. 622.

(*f*) Of which a translation into English is given in 2 Pollock & Maitland, *op. cit.*, p. 371. Part of the Latin original is quoted by Willes J., from Pothier in *Beamish v. Beamish* (1861), 9 H.L.C. 274, at p. 308. The decretal is cited by Pollock in the preface to volume 131 of the Revised Reports.

(*g*) 2 Pollock & Maitland, *op. cit.*, pp. 373-374.

the consent of the parish priest or of the ordinary—should be essential to the validity of a marriage. In England the old rule continued in force until the coming into effect on 25th March, 1754, of Lord Hardwicke's Act, enacted by the Parliament of the United Kingdom in 1753, and, since that statute was inapplicable to Scotland and Ireland, the old rule continued in force in those countries for many years.

A marriage celebrated in Ireland in 1829 by a Presbyterian minister and the subsequent marriage of one of the parties to a third person, gave rise to a prosecution for bigamy. On a writ of error the House of Lords, in *Reg. v. Millis (h)*, by an equally divided vote, affirmed the judgment of the Court of King's Bench in Ireland, in favour of the accused, and, in "astonishing ignorance of the canon law" reached the "certainly wrong result" (i) that the first marriage was invalid on the ground that by the canon law and the common law of England (and consequently the law of Ireland) the presence of a priest (before the Reformation) or of person in holy orders, that is, a clergyman who had been episcopally ordained (after the Reformation) was essential to a valid marriage.

As regards the law of Scotland no court seems to have been guilty of any similar historical error, and the validity of a consensual marriage, without priest or clergyman or religious ceremony, was undisputed, until the law was changed by statute in 1940 (j). Inasmuch as Lord Hardwicke's Act required that "all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall perform the same," the difference between the laws of England and Scotland in the interval between 1754 and 1940, gave rise to interesting questions of the conflict of laws, especially in the case of eloping English couples who crossed the border and were married in Scotland. The speed of this eloping traffic had, however, been somewhat impeded in 1856 by Lord Brougham's Act, which required that one of the parties should have resided in Scotland for three weeks preceding the marriage (k).

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(h) (1844), 10 Cl. & Fin. 534, 59 R.R. 134, 10 R.C. 10, 66; cf. *Doe ex dem. Breakey v. Breakey* (1846), 2 U.C.Q.B. 349; *Wolfenden v. Wolfenden*, [1946] P. 61.

(i) Pollock, in the preface to volume 59 of the Revised Reports.

(j) The Marriage (Scotland) Act, 1939, which came into force 1st July, 1940; cf. 56 Scottish Law Review 173.

(k) Cf. *Bach v. Bach* (1927), 43 Times L.R. 493.

As regards the formalities of celebration of marriage the settled general rule of English conflict of laws is that the governing law is the *lex loci celebrationis*, and that the domicile or nationality of the parties is immaterial. English law is indeed singularly insistent on the observance of the forms of the *locus actus* in this respect, whereas with regard to the forms of wills, except as modified by statute (1) it is equally insistent in the case of land that the forms of the *lex rei sitae* shall be observed, and in the case of movables that the forms of the *lex domicilii* shall be observed.

It is obvious that these rules afford some striking contrasts with the rules prevailing on the continent of Europe. The latter rules are more inclined to allow, if not to prefer, the observance of the forms of the *locus actus* for wills, at least of movables, and to recognize the claims of the personal laws of the parties in respect of the forms of celebrating marriage.

The English rule as to the formalities of celebration of marriage is obligatory, not facultative, and prevails in this sense in all the provinces of Canada, even including Quebec (notwithstanding that in the case of wills of movables the Quebec rule, requiring the forms of the place of making to be observed, is facultative only, and that resort may alternatively be had to the forms of the domicile (m)). The reported cases afford extreme examples of the consistent application of the English rule.

A marriage which takes place in Scotland, in accordance with Scottish law, *per verba de praesenti*, without celebrating officer and without religious or other ceremony, the parties being domiciled in England, is valid in England (n). Similarly, a marriage by registration at Moscow, in accordance with the law of Soviet Russia, is valid in England (o), the fact that the

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(1) *E.g.*, Lord Kingsdown's Act, as regards wills of "personal estate." See chapter 23.

(m) *Ross v. Ross* (1894), 25 Can. S.C.R. 307. As to this case, see chapter 7, § 6(6), and chapter 8, § 6.

(n) *Dalrymple v. Dalrymple* (1811), 2 Hagg. 54, (the man domiciled in England, the woman in Scotland); *Gardner v. Attorney-General* (1889), 60 L.T. 839 (both parties domiciled in England, marriage at Gretna Green); *cf.* older cases cited in Westlake, *Private International Law*, § 23. As to Gretna Green marriages, see the account given by Lord Sands in *Mackie v. Assessor for Dumfriesshire*, [1932] S.C. at p. 404, quoted (1933), 49 L.Q. Rev. 175.

(o) *Nachimson v. Nachimson*, [1930] P. 217. As to this case, see § 13(a) of the present chapter, *infra*.

parties are Soviet citizens domiciled in Soviet territory being immaterial, as would be equally immaterial the fact that they were British subjects or persons domiciled in England.

On the other hand, a marriage of English parties celebrated in Belgium by an Anglican clergyman according to the form of the Church of England is invalid in England, if the form is not an authorized form in Belgium or if the officiating person is not authorized by Belgian law to celebrate marriages there (*p*). So, a marriage celebrated in Paris by a Roman Catholic priest according to the form of the Catholic Church, between two Catholic parties domiciled in the province of Quebec, is invalid in Quebec, unless the requirement of French law, namely, that there shall be a civil ceremony, is complied with (*q*).

In other words, it is immaterial that the form in fact adopted is one which would be sufficient for a marriage celebrated in England or Quebec, or as the case may be, that is, is in fact one of the forms of the forum; the marriage is invalid if it is not celebrated in accordance with the form of the *locus celebrationis*.

It is equally immaterial that the form in fact adopted is one which would not be sufficient for a marriage celebrated in England or Quebec, or as the case may be, or that it is a civil ceremony, or that there is a total lack of ceremony; the marriage is valid in point of form if it complies with the *lex loci celebrationis*. The fact that a marriage celebrated in Quebec or Ontario must be celebrated by a priest or minister of some religious body with the appropriate ceremony is also immaterial in the case of marriages celebrated elsewhere (*r*).

Some exceptional cases should be mentioned here, but they are of so special a character that they only serve to emphasize the rigidity of the general rule. If marriage in accordance with the form of the *lex loci celebrationis* is impossible, or if there is no local form, it would seem that the parties may use the forms of their own personal law (*s*). So, if British subjects

(*p*) *Kent v. Burgess* (1840), 11 Sim. 361.

(*q*) *Berthiaume v. Dastous*, [1930] A.C. 79, [1930] 1 D.L.R. 849.

(*r*) The Civil Code of Lower Canada provides, by article 135: "A marriage solemnized out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnized according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law."

(*s*) Westlake, *Private International Law*, § 26; cf. Dicey, *Conflict of Laws* (5th ed. 1932), rule 182.

are married abroad by or before a British ambassador, minister or consul or other authorized marriage officer in accordance with the Foreign Marriage Act, 1892, enacted by the British Parliament, the marriage must of course be held to be valid by any court which is bound by the statute, but it does not necessarily follow that the marriage will be recognized as valid in the country of celebration (*t*); and the Foreign Marriages Order in Council, 1913, provides that if only one of the parties is a British subject, the officer authorized to solemnize marriages under the Foreign Marriage Act must be satisfied that no objection will be taken to the marriage by the authorities of the country of celebration and that the marriage will be recognized as valid by the national law of the other party. Again, if the parties enjoy the privilege of extritoriality, their marriage is valid if solemnized in accordance with any form recognized as valid by their national law (*u*).

### § 11. Parental Consent: Formalities or Capacity.

A requirement of the consent of parents or guardian to the marriage of a minor is a feature of the law of many countries, and the question whether a requirement of this kind should be characterized as part of the formalities of celebration of marriage, so as to be governed by the *lex loci celebrationis*, or should be characterized as a matter of capacity to marry, so as possibly to be governed by some other law, is a difficult one. This question need not be discussed here, because it is fully discussed in an earlier chapter (*a*).

### § 12. Judicial Separation.

In England, before the coming into force of the Matrimonial Causes Act, 1857, only an ecclesiastical court had jurisdiction to decree divorce *a mensa et thoro*, but that statute transferred to a new civil court the jurisdiction of the ecclesiastical courts

(*t*) *Hay v. Northcote*, [1900] 2 Ch. 262, marriage valid in England, but invalid in France; cf. Westlake, *op. cit.* §§ 27 ff. But, as to the validity of the marriage in France, see also Niboyet, *Manuel de Droit International Privé*, § 623.

(*u*) See Dicey, *op. cit.*, rule 182, and his note as to the difficult questions which may arise as to determining which is the national law (the law of England or the law of some other part of the British Empire?) applicable to the marriage of a British subject on a British merchant ship on the high seas or in a country in which he enjoys the privilege of extritoriality. As to the "national law" of a British subject, see also chapter 9, § 4.

(*a*) See chapter 4, §§ 1 and 2, pp. 48 ff., *supra*.

in matrimonial causes, including jurisdiction with regard to divorce *a mensa et thoro*, thenceforth called judicial separation (*b*). In Canada, English law was adopted in the provinces of British Columbia, Manitoba, Alberta and Saskatchewan after the coming into force of the Matrimonial Causes Act, 1857, and consequently the courts of those provinces have jurisdiction with regard to judicial separation. In the provinces of Nova Scotia, New Brunswick and Prince Edward Island, English law was adopted at an earlier date, and consequently any jurisdiction which the courts of those provinces may possess must be derived from provincial legislation. The courts of Quebec have jurisdiction under the Civil Code of Lower Canada. In Ontario, in the absence of any legislation either of the Parliament of Canada or of the province, the courts have no jurisdiction with regard to judicial separation (*c*).

If a court has general jurisdiction with regard to judicial separation, the next question is what is the basis of its jurisdiction with regard to a particular marriage or particular parties.

The earlier English cases are reviewed in the judgment of Pilcher J. in *Sim v. Sim* (*d*), in which it was held that an English court has jurisdiction to entertain suit for judicial separation by a woman resident in Scotland against a man resident in England, although both parties are domiciled in Scotland. In the earlier case of *Anghinelli v. Anghinelli* (*e*) it had been held by the Court of Appeal, approving *Armstrong v. Armstrong* (*f*), that an English court has jurisdiction to grant judicial separation at the suit of the wife if both parties are resident in England, notwithstanding that the husband, and consequently the wife, are domiciled elsewhere. In the *Armstrong* case the husband went to England, and was temporarily living there, for the purpose of asserting and enforcing his claim to the custody of the children of the marriage, and had in the opinion of Sir Gorell Barnes subjected himself to the jurisdiction of the English courts, and in *Chetti v. Chetti* (*g*) the husband was temporarily present in England and was personally

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(b) See § 2 of the present chapter, *supra*; cf. 8 Encyclopaedia Britannica (11th ed. 1910-1911) 337-339.

(c) See § 3 of the present chapter, *supra*.

(d) [1944] P. 87.

(e) [1918] P. 247.

(f) [1898] P. 178, Sir Gorell Barnes P.

(g) [1909] P. 67.

served there with the citation. In *Eustace v. Eustace* (*h*) it was held by the Court of Appeal that if the respondent is domiciled in England, an English court has jurisdiction to grant judicial separation notwithstanding that the respondent is not resident in England.

### § 13. Terminable and Polygamous Marriages (*a*).

#### (*a*) *Terminable Marriages.*

As has been already pointed out, the general rule is that a marriage will be held valid by an English court (*b*) if it is celebrated in accordance with the formalities of the *lex loci celebrationis* (*c*), between consenting parties who are capable by the *lex domicilii* of marrying each other (*d*). Furthermore, in order that the union in question be entitled to recognition as a marriage in England, it must in its essential features be marriage as understood in Christendom (*e*); it must, as defined in the case of *Hyde v. Hyde* (*f*), be the "voluntary union for life of one man and one woman, to the exclusion of all others."

It being premised that a marriage celebrated in England in

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(*h*) [1924] P. 45, distinguishing *Graham v. Graham*, [1923] P. 31.

(*a*) The original of this § 13, as it appeared in my report submitted to the Congress of Comparative Law at the Hague, 1932, and as published in [1932] 4 Dominion Law Reports at pp. 16-28, was translated into Italian and published in 2 *Rivista di Diritto Privato* (Padua, 1932) 297-307. See also 1 Rabel, *Conflict of Laws* (1945) 207, note 30, and Fedozzi, *Il Diritto Internazionale Privato* (1935) 455, 456, approving the recognition in a country in which polygamy is not permitted of rights of succession, etc., resulting from a polygamous union contracted in a foreign country in which polygamy is permitted.

(*b*) For the sake of simplicity of statement the law is stated with reference to an English court and English law. It is to be assumed that the law stated is equally applicable to the provinces of Canada, unless it appears from the context that a different law prevails there.

(*c*) As to formalities of celebration, see §§ 10 and 11 of the present chapter, *supra*.

(*d*) As to the difficulties arising if the parties are domiciled in different countries, and as to the distinction between incapacity and illegality, see § 9 of the present chapter, *supra*.

(*e*) This expression, or the expression "Christian marriage," is a convenient one, and is used to include marriages of the same character, whether they be Jewish, gentile, pagan, oriental or occidental, or what not. It is also convenient, and appropriate for the purpose of the present chapter, to refer to such a marriage as "marriage in the English sense."

(*f*) (1866), L.R. 1 P. & D. 130, 133, Lord Penzance. As to the limitations of the scope of the decision in this case, see sub-heading (*c*) of the present § 13, *infra*.

some form authorized by English law must be presumed to be intended to be a marriage for life (*g*), and that an intention to the contrary which is not expressed and made part of the ceremony would not affect its validity, it would seem clear that if the parties expressly contract for a temporary or trial marriage, or a marriage terminable by consent, the union would not be recognized as a valid marriage in England. The case of *Nachimson v. Nachimson* (*h*) makes it equally clear, however, that a marriage is not necessarily invalid in England merely because under the *lex loci celebrationis*, or the *lex domicilii* or the national law of the parties, it is virtually terminable by consent. Two domiciled Soviet citizens were married at Moscow in 1924 in accordance with the local form, that is, by registration of their mutual consent, without religious or other ceremony. Therefore the marriage was in point of form valid in England, and it was held that it was also valid in point of substance. At the time of the solemnization of the marriage the Soviet Russian law permitted a marriage to be dissolved either by mutual consent registered in the proper registration office, or by an order of a court having jurisdiction in the place of residence of either party upon the application of the other party after notice given or proof made that service of notice was impossible. In 1927 the law was altered so as to make a court order unnecessary in any case and to permit the marriage to be dissolved either by the registration of mutual consent or by the registration of the declaration of either party. In January, 1929, the man registered, *ex parte*, at the Consulate General in Paris of the Union of Soviet Socialist Republics, a declaration of dissolution as to the validity of which the expert witnesses who gave evidence before the English court were not in agreement. In March, 1929, the woman filed a petition in England asking for a judicial separation on the ground of the man's cruelty. Hill J. dismissed the petition on the ground that there never had been any valid marriage and therefore the court had no jurisdiction to grant judicial separation. The Court of Appeal, reversing Hill J., held that the marriage was valid, it being the voluntary union of one man and one woman for life, subject, like an English marriage, to its being sub-

(*g*) Cf. Westlake, *Private International Law*, § 34a; *Rex v. Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K.B. 684, at p. 640.

(*h*) [1930] P. 217.

sequently dissolved in accordance with the proper law governing divorce.

In reaching this conclusion the Court of Appeal excluded from consideration the change made in the Soviet Russian law in 1927, but it would appear that the decision would have been the same if the marriage had been solemnized after this change in the law, because the court was of opinion that the facilities offered by the Soviet Russian law for the dissolution of marriage had no bearing on the question of the original validity of the marriage by that law. In other words, the provisions of the law relating to the dissolution of a marriage are conditions of defeasance existing independently of the will of the parties and form no part of the agreement of the parties with regard to the nature of their union. The matter may also be stated in still another way, namely, that the law of one country may be the governing law as to the validity of the marriage, and the law of another country may be the governing law as to the dissolution of the marriage. This is of course clearer under the English system of the conflict of laws than it may be under some other systems. Under the English system the law governing the dissolution of a marriage is the law of the domicile of the parties at the time of the commencement of the suit for divorce, and the court of the then domicile has exclusive jurisdiction to decree divorce (*i*); and the question of the validity of the alleged divorce in the *Nachimson* case, which was not considered by the court, has been already discussed (*j*). There is, however, no tenable theory upon which the law of the domicile of the parties at the time of the commencement of the suit for divorce could be held to be the law governing the original validity of the marriage—as to which the only possible governing law would be either the *lex loci celebrationis* or the *lex domicilii* at the time of the marriage, or the national law of the parties at that time, which all happened to be the same in the *Nachimson* case. In what I have just said I mean by governing law the law to which recourse must be had in order to ascertain the character of the marriage. When the character of the marriage is ascertained, an English court must decide whether the marriage conforms with the essential requirements of marriage in the English sense. If, as the English court decided in the *Nachimson* case, the marriage

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(i) See § 4 of the present chapter, *supra*.

(j) See § 6 of the present chapter, *supra*.

conforms with those requirements, there is no reason why the English law as to divorce and judicial separation should not be applied as the occasion might arise. If, on the other hand, an English court in other circumstances decided that the marriage did not conform with the essential requirements of English law, as, for example, if it were held to be polygamous or potentially polygamous, there would arise a different question, to be discussed later (*k*), namely, whether the union, such as it is, is entitled to recognition, not as a marriage in the English sense, but as a lawful union, creating a status of the parties and a relation between them, and whether effect may be given in England to the existence of the union and, to some extent, to the incidents of that union.

In the *Nachimson* case the woman stated in evidence that when she was married she intended the union to be for life, and there was no evidence that the man had any different intention; and the court laid some stress on the intention of the parties, declining to predict what might be done in a future case if it were proved that the parties had intended to enter into a merely temporary union.

It is submitted, with respect, that this doctrine that the validity of a marriage may depend on the unexpressed intention of the parties is possibly open to some logical and practical objections. It having been decided that the means which the law provides for the dissolution of a marriage have no bearing upon the question of its original validity, why should the parties' intention to avail themselves of the means of dissolution have logically any bearing on that question? Again, from a practical point of view, if marriage under the Soviet Russian law is the only marriage available to the people of Soviet Russia, why should the validity of every Soviet Russian marriage depend in England upon the result of a judicial finding as to the intention of the parties at the time of the marriage, notwithstanding that the parties may have subsequently lived for the rest of their lives in normal conjugal happiness? If parties to a marriage under English law made a private agreement that if they did not get on well together they would subsequently procure a divorce, one of them furnishing cause, it could hardly be successfully argued that the marriage was void, but it is true they might have difficulty in carrying out their agreement, as their collusion, if revealed to an English court, would be ground for refusing a decree of divorce.

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(*k*) See sub-heading (c) of the present § 13, *infra*.

(b) *Potentially Polygamous Marriages.*

The issue raised by the case of *Nachimson v. Nachimson* may have an important effect in leading English courts to reconsider their attitude towards matrimonial unions contracted under a system of law which recognizes polygamy (*l*). If parties to such a union intend to contract a monogamous marriage, it would seem reasonable that their union should be recognized as marriage elsewhere. From the moral point of view there would not appear to be much difference between concurrent polygamy and consecutive polygamy (*m*), and if a marriage contracted under a system of law which permits dissolution at the will of the parties is valid in the event of the parties intending to contract marriage for life, then it would seem to follow that a marriage contracted under a system of law which recognizes polygamy is valid in the event of the parties intending to contract a monogamous marriage. The application of the intention doctrine to a potentially polygamous union is indeed free from the logical objection, suggested above, to its application to terminable marriages, namely, that its application seems in the latter case to amount to the resuscitation of the doctrine, rejected by the court in *Nachimson v. Nachimson*, that the validity of a marriage may be tested by reference to the facilities provided by law for its dissolution.

The leading case in England as to polygamous marriages is *Hyde v. Hyde* (*n*), from which the famous definition of marriage has been already quoted. Hyde and Miss Hawkins were both members of the Mormon Church, he being an ordained priest of that church. They were married in 1853 at Salt Lake City in the territory of Utah in the United States of America by Brigham Young, president of the Mormon Church. Polygamy was a part of the Mormon doctrine and was the common custom in Utah (*o*), but Hyde did not avail himself of his privilege of marrying two or more wives. In 1856 Hyde renounced the

(*l*) See especially Vesey-Fitzgerald, *Nachimson's* and *Hyde's* Cases (1931), 47 L.Q. Rev. 253; cf. Fitzpatrick, *Non-Christian Marriage* (1900), 2 Jo. Comp. Leg., 2nd series, p. 359, (1901), 3 *ibid.* 157. The question now under discussion is whether such matrimonial unions may in some circumstances be recognized as marriages in the English sense, as distinguished from the question discussed under sub-heading (c) of the present § 13, *infra*.

(*m*) Cf. 47 L.Q. Rev. at p. 255.

(*n*) (1866), L.R. 1 P. & D. 130.

(*o*) But the English court "wrongly assumed polygamy to be legal" in Utah. See 2 Beale, *Conflict of Laws* (1935) 700.

Mormon faith, and was thereupon excommunicated by the Mormon Church in Utah. Mrs. Hyde was declared in Utah to be free to marry again, and was subsequently married in Utah to another man. Hyde, having resumed his English domicile of origin, sued in England for divorce, but his suit was dismissed on the ground that his supposed marriage in Utah was polygamous in nature and therefore not entitled to recognition as a marriage in England, that is, as a marriage in the English sense (*p*).

Notwithstanding some *dicta* of eminent judges in the *Hyde* case and elsewhere (*q*), it would nevertheless appear to be the better view that a marriage contracted in a country in which polygamy is recognized is not necessarily to be characterized as polygamous merely by reference to a liberty of which the parties do not avail themselves, but that, on the contrary, if the marriage is in intention and in fact monogamous, it is entitled to recognition as marriage in England, even though the parties are domiciled in the country of celebration at the time of the marriage (*r*).

While judicial approval of the view just stated appears to be lacking in England, there is some authority in Canada and the United States for saying that a marriage monogamous in fact and proved or inferred to be monogamous in intention may be entitled to recognition as marriage elsewhere. In *Royal v. Cudahy Packing Company* (*s*) a Mohammedan man and woman, Turkish subjects, were married as Mohammedans in Syria some years before 1900. The Supreme Court of Iowa expressed the opinion that the marriage was entitled to recognition as mar-

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(*p*) This is of course inconsistent with the somewhat vague *obiter dictum* of Lord Brougham in *Warrender v. Warrender*, (1835), 2 Cl. & F. 488, at p. 532, that under a polygamous system a first wife is validly married, but a second wife is not married. The *dictum* in question, which would appear to be illogical and wrong, was part of other observations which had little or nothing to do with the question to be decided.

(*q*) *Harvey v. Farnie* (1881), 6 PD. 35; *cf.* 47 L.Q. Rev. at pp. 257-259.

(*r*) *Cf.* 47 L.Q. Rev. at p. 255. As regards the original validity of the marriage, it would seem to be immaterial whether the parties subsequently acquire an English domicile or not, but of course the acquisition of an English domicile may be an essential prerequisite to the granting by an English court of some forms of matrimonial remedy.

(*s*) (1922), 195 Iowa 759, 190 N.W. 427. The decision is approved by Vesey-Fitzgerald, in 47 L.Q. Rev. at p. 262. See also Goodrich, *Conflict of Laws* (2nd ed. 1938) 321; 2 Beale, *Conflict of Laws* (1935) 698.

riage, the man not having married another wife and there being no evidence that he had intended to marry more than one wife or that monogamous marriages were uncommon in Syria. In the Quebec case of *Connolly v. Woolrich* (*t*) a white man and a woman of the Cree tribe of Indians were married in 1803, in the wilds of the Athabaska country in the Indian Territories (*u*), now part of Canada, in the customary manner of the tribe. The marriage was held valid in Quebec, partly at least on the ground that though polygamy was practised among the Indians themselves, marriages of white men and Indian women were monogamous (*v*). *Connolly v. Woolrich* was distinguished in the later English case of *In re Bethell* (*w*), in which an Englishman and a woman of the Baralong tribe inhabiting a portion of Bechuanaland in South Africa outside of the British dominions were married in 1883 according to the customary manner of the tribe. The marriage was held to be void (*x*), because polygamy was recognized among the Baralongs, and the evidence was clear that the man intended to contract marriage in the Baralong sense only and was not willing to be married by a clergyman in the English form. In the Ontario case of *Robb v. Robb* (*y*) a white man and a woman of the Comox tribe of Indians in British Columbia were married in 1869 in the customary tribal manner. The court distinguished *In re Bethell* on the ground that polygamy was legal in the Baralong country, whereas it was illegal in British Columbia (though customary

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(*t*) (1867), 11 L.C. Jurist 197, 3 L.C.L.J. 14, Monk J., affirmed by a majority of the Court of Queen's Bench in Appeal, *sub nom. Johnstone v. Connolly* (1869), 1 *Revue Légale* 253.

(*u*) See *In re Lee Cheong* (1923), 33 B.C.R. 109, at p. 129, S.C. *sub nom. Yew v. Attorney-General*, [1924] 1 D.L.R. 1166, at p. 1184.

(*v*) *Connolly v. Woolrich* was the subject of some vague expressions of disapproval in the later Quebec case (in which, however, there was no evidence of any marriage, even in the Indian form) of *Fraser v. Pouliot* (1885), 13 *Revue Légale* 520, reported *sub nom. Jones v. Fraser*, 12 Q.L.R. 327. Monk J., now a member of the Court of Queen's Bench, followed his own decision in *Connolly v. Woolrich* and dissented from the majority of the court, which held the marriage to be void.

(*w*) (1888), 38 Ch. D. 220.

(*x*) That is, in the sense of not being a marriage in the English sense. The decision that the child of the marriage was not entitled to succeed in England to movables belonging to her father's estate is, it is submitted, justifiable only on the supposition that Bethell was domiciled in England at the time of his death. Otherwise this part of the decision is inconsistent with the thesis submitted under sub-heading (*c*) of the present § 13. From this point of view the *Bethell* case is further discussed there.

(*y*) (1891), 20 O.R. 591.

in the Comox tribe); and distinguished *Connolly v. Woolrich* on the ground that in Athabaska there were no clergymen or civil officers who could have celebrated a marriage, and therefore the Indian ceremony was the only one available to the parties, whereas in British Columbia a clergyman or a civil officer might have been found within reasonable distance. Without regard to the deductions (perhaps mutually contradictory) to be drawn from these distinctions, the court in *Robb v. Robb* held the marriage to be valid on a ground which is not relevant to the subject matter of this chapter, namely, that by reason of the subsequent conduct of the parties and their passing as husband and wife among their white friends, there was raised a sufficient presumption that they had at some time or other been validly married. In *Connolly v. Woolrich* the judgments upholding the marriage were also based in part on this ground (z).

In the light of the cases discussed above the following propositions are submitted as being reasonable: (1) In the case of a marriage which takes place in a country in which polygamy is illegal, any marriage celebrated in accordance with the authorized forms of the law of that country are monogamous, and any other marriages celebrated there are invalid. (2) In the case of a marriage which takes place in a country in which polygamy is recognized by the territorial law, or in an unsettled or uncivilized country in which there is no territorial law, a further distinction should be made. (a) If the local form is obligatory or if no other form is available, a marriage which is monogamous in intention and in fact should be recognized as valid elsewhere. (b) If the parties have a choice between the local form and their own form (that is, the form of their own domiciliary or national law) or have an opportunity of contracting a valid monogamous marriage in some form other than the local form, and they deliberately choose the local form, they should be presumed to have intended a polygamous marriage, and their marriage, as a general rule, should not be entitled to recognition as marriage in the sense in which marriage is understood in Christendom.

(c) *Recognition of Foreign Polygamous Marriages.*

The question so far discussed has been whether a so-called

(z) As to this presumption of the due celebration of a marriage, see also the discussion of *Leong Sow Nom v. Chin Yee Yau* (1934), 49 B.C.R. 244, [1934] 3 W.W.R. 686, towards the end of chapter 13.

marriage is entitled to recognition in England because it is a marriage as understood in Christendom or a marriage in the English sense. In answering that question an English court must necessarily apply its own rules of law with regard to the essential character of marriage to the kind of marriage which it finds to have been contracted in the particular case. If the court decides that the marriage is not entitled to recognition in England as a marriage in the English sense, because it is polygamous, the task of the court is not necessarily completed; the case may raise the further question whether the marriage, such as it is, is entitled to some kind of recognition, or recognition for some purposes (*a*).

The case of *Hyde v. Hyde* (*b*) decided merely that an English divorce court would not decree divorce in the case of a polygamous marriage; and the principle involved in the decision may be stated more broadly, namely, that a court created for the purpose of granting remedies in matrimonial causes in England, and the practice and jurisdiction of which are at least in part inherited from former ecclesiastical courts, will not grant to parties to a polygamous marriage remedies appropriate to marriage as understood in Christendom, but inappropriate to a different kind of marriage, and that the status of the parties created by marriage in the one sense, or the rights and obligations resulting from that status, are not necessarily the same as the status, and the rights and obligations arising therefrom, created by marriage in another sense.

Although polygamy is an institution which has no counterpart in English law and which is even rejected by English law on moral or religious grounds (*c*), it does not follow that it would be either just or reasonable or in accordance with law, that an English court should refuse to give any recognition to a polygamous marriage validly contracted under its proper foreign law (*d*) or should afford no protection to the parties to such a marriage or the children of such a marriage.

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(*a*) See the articles by Vesey-Fitzgerald and Fitzpatrick cited in note (1), *supra*.

(*b*) (1866), L.R. 1 P. & D. 130. The facts are stated above: see note (*n*).

(*c*) Cf. Franz Kahn, *Abhandlungen zum Internationalen Privatrecht* (1928), vol. 1, at pp. 114-118.

(*d*) The technically foreign law, it need hardly be pointed out, is quite likely to be the law of some part of the British dominions.

In the case of *Hyde v. Hyde* itself, the court defined with some care the limited scope of the decision (*e*):

In conformity with these views the court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

Under the English system of the conflict of laws the clearest example of "people living under the sanction of such unions" would be people domiciled in a country in which polygamy is recognized and practised, and marrying under the law of that country, but it is probable that an English court would consider that the proper law governing a polygamous marriage might in some circumstances be sufficiently based on facts other than domicile in the English sense.

The right view, it is submitted, is that parties to a polygamous marriage which is valid by its proper law acquire by the marriage a lawful status which should be recognized in England as such, and that they cannot be regarded, either socially or legally, as unmarried persons living in a state of concubinage; and that it is immaterial whether after the marriage they acquire a domicile (in the English sense) in England or not. Obviously the character of the marriage must be fixed at its inception, and if it is originally polygamous under its proper law, the change of domicile cannot either entitle it to recognition as a marriage in the English sense or render illegal and void what is originally lawful and valid.

The recognition in England of the lawful status created under the proper foreign law does not, however, necessitate the recognition in England of all the incidents attaching to that status by the foreign law or of all the rights or capacities which the parties might have or all the duties or incapacities to which they might be subject under the foreign law (*f*). If the parties to the marriage visited or took up their residence in England, whether they became domiciled there or not, they would probably be obliged to pay a decent measure of respect to English social customs, or, at least, not to conduct themselves in flagrant

(*e*) (1866), L.R. 1 P. & D. 130, at p. 138, Lord Penzance.

(*f*) See especially Allen, *Status and Capacity* (1930), 46 L.Q. Rev. 277, at pp. 308-311.

disregard of such customs. While the husband could not be convicted of bigamy for having lawfully married two wives abroad, he would not have the privilege of marrying another wife in England without rendering himself criminally liable (*g*). The powers of physical coercion which the husband might exercise in his own country over his wife or wives might be limited in England by the rules of English law.

It is not easy to state exactly or with certainty what measure of protection an English court might afford to one of the parties to a polygamous marriage who are living in England; there are obvious difficulties about giving relief in some circumstances, and there is danger that in giving relief an English court may be doing something which is inconsistent with the real character of the marriage according to its proper law. There would not appear, however, to be any reasonable objection to the recognition by an English court of a right of succession or a status of a legitimate child of the marriage.

In the case of *In re Lee Cheong* (*h*) a Chinese subject, domiciled in China, but carrying on business in China and in the Province of British Columbia, died in British Columbia. By his will he gave an annuity of \$1,000 to each of his two wives, whom he had lawfully married in China, and it was held in British Columbia that each of his wives was to be recognized as wife so as to exempt the legacy made to her from liability for duty under the provincial Succession Duty Act. Reference was made in one of the judgments to the earlier decision of the Privy Council, on appeal from the Supreme Court of the Straits Settlements, in the case of *Cheang Thye Phin v. Tan Ah Loy* (*i*). It appeared in that case that according to the Chinese law applicable to Chinese residents in Penang, a man might have secondary wives, and these wives had the status of wives and their children were legitimate. It was therefore held that Tan Ah Loy was one of the secondary wives of the deceased Cheang Ah Quee, who had resided and carried on business in Penang and that she was entitled to a widow's share in his estate. The decision of the Privy Council was of course merely that the secondary wife was entitled to share in the estate of her husband

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(*g*) *Rex v. Naguib*, [1916] 1 K.B. 359; *cf.* (1931), 47 L.Q. Rev. 253, at pp. 267-269.

(*h*) (1923), 33 B.C.R. 109, S.C., *sub nom.* *Yew v. Attorney-General*, [1924] 1 D.L.R. 1166. The judgments in this case review many of the cases mentioned in this chapter and some others.

(*i*) [1920] A.C. 369.

in the Straits Settlements, but it would appear to be a reasonable conclusion that if her husband had left assets in England, an English court would have held that she was entitled to share in them; and it is submitted that the British Columbia court was right in holding, in a parallel case, that both wives of the domiciled Chinese subject were wives for the purpose of succession to assets in British Columbia of his estate. In an earlier English case of *Re Ullee* (j) it appeared that a Mohammedan British subject, domiciled in British India, who had at least one wife in India, went through a Mohammedan form of marriage in England with a Christian Englishwoman who did not know that he had any other wife. The question of the custody of the children of this marriage came later before an English court, and, it being assumed that the marriage was a nullity, it was proved that the children had been recognized by their father and were therefore entitled to the status of legitimate children in India, and it would appear from the judgments in the English court that if it had been necessary to decide the question in England, the legitimacy of the children would have been recognized there also. In the United States the question of the validity of marriages between members of American Indian tribes, celebrated in Indian territory according to the Indian forms, has frequently come before the courts, and the courts have, as a general rule, held that a marriage of this kind, even though polygamous in nature, creates a status which is entitled to recognition, at least for the purposes of succession to property and legitimacy of children (k).

In the case of *In re Bethell* (l), the marriage of Bethell with a woman of the Baralong tribe in Bechuanaland outside of the British dominion, was held by an English court to be polygamous, and there seems to be no reason for finding fault with this conclusion (m), but the court's denial of the right of succession to movables in England of a child of the marriage is more difficult to justify. If we suppose that Bethell was continuously domiciled in England, notwithstanding his sojourn in the Baralong country, or at least that he was domiciled in

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(j) (1886), 53 L.T. 711, 54 L.T. 286; cf. Westlake, *Private International Law*, § 58.

(k) See Goodrich, *Conflict of Laws* (2nd ed. 1938) 319; 2 Beale, *Conflict of Laws* (1935) 677, 701.

(l) (1888), 38 Ch. D. 220.

(m) See sub-heading (b) of the present § 13, *supra*.

England at the time of his death (*n*), it would follow that the child of the polygamous marriage would not be entitled under the English domestic law of succession. If on the other hand, Bethell was domiciled in the Baralong country at the time of his death, there would seem to be no justification for denying the status of the child as a legitimate child and therefore entitled to such rights of succession as might be conferred by Baralong law.

*Postscript (1946)*

The foregoing § 13 is substantially a reprint of the corresponding portion of my report submitted to the International Congress of International Law (The Hague, 1932), published in Canada later in the same year (*o*). Contemporaneously a valuable article by Beckett appeared under the title *The Recognition of Polygamous Marriages under English Law* (*p*). Subsequently the subject of polygamous marriages has been discussed by Johnson (*q*) and Cheshire (*r*). It is gratifying to find that in spite of inevitable differences of opinion on some points, we are all in substantial agreement on the main conclusion that a polygamous union contracted under its proper foreign law creates a status of the parties as married persons and of the children of the marriage as legitimate children which is entitled to some measure of recognition in another country, even though the union is not a "marriage" in the sense in which that word is defined by the law of that country.

The "main conclusion" above mentioned has been confirmed by recent English judicial decisions which are especially interesting because the question of the recognition of foreign polygamous marriages has presented itself to the courts in a novel manner. It may be assumed that a party to a polygamous marriage is not entitled to sue in England for a declaration of the nullity of the marriage, because, as held in *Hyde v. Hyde*

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(*n*) In favour of the view that Bethell's English domicile was the controlling element in the decision, see Fitzgerald, *Non-Christian Marriage* (1900), 2 Jo. Comp. Leg., 2nd series, 350, at pp. 383-387. It is stated in the judgment (38 Ch. D. at p. 233) that the portion of the chief clerk's certificate which found that Bethell's domicile was English had not been excepted to.

(*o*) [1932] 4 D.L.R. 16-28.

(*p*) (1932), 48 L.Q. Rev. 341.

(*q*) *Conflict of Laws*, vol. 1 (1933) 309 ff.

(*r*) *Private International Law* (2nd ed. 1938) 317 ff., 380 ff.

(s), the remedies available in matrimonial causes in English law are appropriate to marriage as understood in Christendom, or in the English sense, but are inappropriate to marriage in a different sense. There is, however, a more substantial reason why a party to a polygamous marriage cannot successfully sue for annulment in England, namely, because the marriage is neither void nor voidable, but on the contrary is an existing relation between the parties which is inconsistent with, and consequently renders void, a subsequent marriage of either of the parties to another person. That other person may, consistently with the *Hyde* case, sue for a declaration of nullity of the subsequent marriage.

In *Srini Vasan (otherwise Clayton) v. Srini Vasan* (t) the petitioner, an English woman, asked for a declaration of the nullity of her marriage, celebrated in England, with the respondent, who was a Hindu domiciled in India, but temporarily resident in England, and who had a wife in India, a Hindu whom he had married in India in accordance with Hindu law. It having been proved that the Hindu marriage, although potentially polygamous, was a valid and existing marriage by Hindu law, Barnard J. held that the subsequent marriage of the petitioner and the respondent was void. The learned judge quoted with approval a passage from Beckett's article, referred disapprovingly to unnamed "text books" (u), and relied chiefly on the speech of Lord Maugham L.C. before the Committee of Privileges in the House of Lords in the *Sinha Peerage Claim* (v).

Again, in *Baindail (otherwise Lawson) v. Baindail* (w) Barnard J. followed his own previous decision in the *Srini Vasan* case, and an appeal to the Court of Appeal was dismissed, the court relying chiefly on the speech of Lord Maugham in the *Sinha Peerage* case in favour of the view that a Hindu marriage is entitled to recognition in England. Lord Greene M.R. admitted that he did not know whether there were any purely English cases on the point, but said "there are no doubt cases in the Privy Council." The respondent in the *Baindail* case, while domiciled in India, married a Hindu woman accord-

(s) (1866), L.R. 1 P. & D. 130.

(t) [1946] P. 67.

(u) His researches were in this respect far from being exhaustive.

(v) Journals of the House of Lords, 1939, vol. 171, p. 350.

(w) [1946] P. 122.

ing to Hindu rites and that marriage was still existing when he went through the ceremony of marriage in England with an English woman. On her petition the subsequent marriage was declared to be null.

Lord Greene M.R. carefully pointed out that his opinion related solely to the facts of the particular case which were connected with the validity of the English marriage in the circumstances, but the passage which he quoted from Lord Maugham's speech in the *Sinha Peerage* case includes the statement that "a Hindu marriage between persons domiciled in India is recognized in our courts, that the issue are regarded as legitimate and that such issue can succeed to property, with the possible exception to which I will refer later" (x). On the other hand, Lord Greene made some general observations on the distinction between the existence of status and capacity incidental to status. These observations are important in the conflict of laws far beyond the scope of the decision in the particular case (y). He said (z):

- - - the courts of this country do for some purposes give effect to the law of the domicile as affixing or imposing a particular status on a given person. It would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. There are some things which the courts of this country will not allow a person in this country to do whatever status with its consequential capacity or incapacity the law of his domicile may give him. The case of slavery, of course, is an obvious case. The status of slavery would not be recognized here, and a variety of other things involved in status will not be recognized here. In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicile but by the *lex loci*. I refer to the illustrations in order to show that there cannot be any hard and fast rule relating to the application of the law of the domicile as determining status and capacity for the purpose of transactions in this country.

(x) That is, the exception of inheritance of real property, and possibly some other cases: cf. [1946] P. 67, at p. 69.

(y) See chapter 4, § 8, at pp. 79 ff., *supra*. See also chapter 39, in which I have ventured to criticize Scott L.J.'s theory of the universality of status and its incidents.

(z) [1946] P. at p. 128.

## CHAPTER XLI.

### RECOGNITION OF FOREIGN DIVORCES: THE FULL FAITH AND CREDIT CLAUSE\*

The case of *Williams v. State of North Carolina* (a) decided by the Supreme Court of the United States on December 21, 1942, is not only an important case on the constitutional law of the United States, but is also of great interest to Canadians by reason of the doctrine stated in *Armitage v. Attorney-General* (b). In the latter case it was held that a divorce granted by a court of a state in which the parties were not domiciled (South Dakota) was entitled to be recognized in England because the divorce would be recognized as valid by a court of the domicile (New York) if the question arose there. The decision was only that of a single judge, but it has not since been overruled or dissented from, and would appear to be justifiable because it avoids the absurdity of a court which bases its own divorce jurisdiction on domicile declaring invalid a divorce which is valid in the country of the domicile, and has the desirable result of reducing the number of cases in which parties are divorced in one country and still man and wife in another country (c). The principle of the *Armitage* case applies not only if the divorce must, under the Constitution of the United States, be recognized as valid by a court of the domicile, but also if the court of the domicile, though not compelled to recognize the validity of the divorce, would in fact recognize its validity.

Until the *Williams* case was decided by the Supreme Court of the United States, the question whether a divorce decree made

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\*This chapter reproduces two case comments published (1943), 21 Canadian Bar Review 135-141, and (1945), 23 Canadian Bar Review 591-595.

(a) (1942), 317 U.S. 287, 63 Supreme Court Reporter 207. In the latter portion of this chapter this case is called *Williams I*, in order to distinguish it from a subsequent case between the same parties, referred to as *Williams II*.

(b) [1906] P. 136, Sir Gorell Barnes P. This case is discussed in chapter 40, § 6(b).

(c) The results, in various circumstances, of the combined effect of the doctrine of the *Armitage* case and of the Divorce Jurisdiction Act, 1930, are discussed in chapter 40, § 6(b).

in one of the United States must, under the "Full Faith and Credit Clause" of the Constitution of the United States (*d*) be recognized as valid in another state was the subject of a formidable mass of critical writing in the United States. Much of the controversy raged around the decision of the Supreme Court in *Haddock v. Haddock* (*e*). That case (*f*)

involved a suit for separation and alimony brought in New York by the wife on personal service of the husband. The husband pleaded in defence a divorce decree obtained by him in Connecticut where he had established a separate domicile. This court [the Supreme Court of the United States] held that New York, the matrimonial domicile where the wife still resided, need not give full faith and credit to the Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicile, service on her having been obtained by publication and she not having entered an appearance in the action.

The *Haddock* case may seem strange to a lawyer trained in the law of England or the law of any of the common law provinces of Canada, because, apart from the question of the lack of effective service on the defendant and of opportunity to defend (*g*), the Connecticut court, being the court of the domicile of the husband (and therefore the domicile of both husband and wife according to English law) had jurisdiction according to English law. It should be noted, however, that the *Haddock* case was based upon the theory that a court of the country of the "matrimonial domicile," that is, the place where the parties last lived as husband and wife with the intent of making that place their home, and which, although wrongfully abandoned by one of the parties, is still the domicile of the other party when the divorce action is brought (*h*), has a predominant

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(*d*) Article 4, s. 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." By an Act of Congress it is provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

(*e*) (1906), 201 U.S. 562.

(*f*) As related in the judgment of the majority of the court in the *Williams* case.

(*g*) Cf. *Rudd v. Rudd*, [1924] P. 72; *Rex v. Brinkley* (1907), 14 O.L.R. 434; *Delaporte v. Delaporte* (1927), 61 O.L.R. 302, [1927] 4 D.L.R. 933; *Bavin v. Bavin*, [1939] O.R. 385, [1939] 2 D.L.R. 278, 3 D.L.R. 328.

(*h*) Matrimonial domicile in this sense must of course be distinguished from the matrimonial domicile which was rejected as the basis of divorce jurisdiction in *LeMesurier v. LeMesurier*, [1895] A.C. 517. Cf. Goodrich, *Conflict of Laws* (2nd ed. 1938) 346.

claim to exercise divorce jurisdiction with regard to the parties. This theory is, to say the least, quite as respectable as the English doctrine, rejected in the *Haddock* case, that a husband may desert his wife in the country of their common domicile, acquire a new domicile in another country and thus impose the new domicile on his wife, and then obtain a valid divorce in the country of the new domicile. The English doctrine is based upon the purely mechanical application of two separate conflict rules, namely, that divorce jurisdiction is based upon the domicile of the parties, and that the domicile of the wife is that of the husband. The woman is "caught by a complex of rules of law, each of them not unreasonable, but, when fused together, producing hardship" (*i*). The rule that divorce jurisdiction is based on the domicile of the parties is in itself reasonable, but the social value of the rule is clear only if the common domicile of the parties is a reality (*j*), and vanishes into thin air when it is applied to the case of a husband who deserts his wife and who either acquires a new domicile in another country or whose new or present domicile is practically unascertainable, and the situation leads to the logical, but unjust, result exemplified in *Attorney-General for Alberta v. Cook* (*k*). Again, in the analogous case of the combination of the rule that succession to movables is governed by the law of the domicile with the rule that the wife's domicile is that of the husband, we get the logical, but absurd, result exemplified by *Lord Advocate v. Jaffrey* (*l*). It is respectfully submitted that in some at least of these situations the English courts or the House of Lords or the Privy Council ought, before it was too late, to have given some consideration to the question whether separate conflict rules, each of which was presumably formulated because it served some useful social purpose, should have

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(i) See Hughes, *Judicial Method and the Problem of Ogden v. Ogden* (1928), 44 L.Q. Rev. 217. For suggestions as to the remedy for the grotesquely unjust situation of the woman in *Ogden v. Ogden*, [1908] P. 46, see chapter 40, § 8.

(j) It would appear probable that the Privy Council in *LeMesurier v. LeMesurier*, [1895] A.C. 517, at p. 540, had this situation in mind when it said that the domicile for the time being of *the married pair* affords the only true test of jurisdiction to dissolve their marriage, and that it is both just and reasonable that the differences of married people should be adjusted in accordance with the laws of the community to which they belong.

(k) [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742. As to this case, see chapter 40, § 5.

(l) [1921] 1 A.C. 146, 11 Brit. R.C. 1.

been mechanically, and even logically, combined without the slightest regard to the injustice or absurdity of the result. In some situations at least, it would seem that these courts might well have considered, before it was too late, whether a more respectable solution might be found by recognizing that in some circumstances and for some purposes a wife should be able to retain or acquire a domicile separate from that of her husband. In other words, the courts might, before it was too late, have laid stress on the social purpose of the rules that succession to movables and divorce jurisdiction are governed by the law of the domicile, and have considered as a new situation, requiring the formulation of a new rule, the case of the husband and wife who are living separate from each other in different countries, instead of applying the seven century old common law doctrine stated by Bracton, Littleton, Coke and Blackstone, in Latin, law French and English, that husband and wife are one person in law (*m*).

*Haddock v. Haddock* (*n*) was expressly overruled by the Supreme Court in *Williams v. State of North Carolina*, of which the facts must now be shortly stated. O. B. Williams and Carrie Wyke were married in North Carolina in 1916 and lived together there until May, 1940, and had four children. Lillie Shaver and Thomas Hendrix were married in North Carolina in 1920 and lived together there until May, 1940. At that time Williams and Mrs. Hendrix went to Las Vegas, Nevada, and on June 26, 1940, each commenced a divorce action. Williams obtained a divorce decree on August 26, 1940, and Mrs. Hendrix on October 4, 1940. On the latter date they were married to each other in Nevada, and thereafter returned to North Carolina where they lived together until they were prosecuted for bigamous cohabitation under a North Carolina statute. The situation was stated in Jackson J.'s dissenting judgment as follows:

In May of 1940 Mr. Williams and Mrs. Hendrix left their homes and respective spouses, departed the state, but after an absence of a few weeks reappeared and set up housekeeping as husband and wife. North Carolina then had on its hands three marriages among four people in the form of two broken families, and one going concern.

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(*m*) Cf. the amazing use of quotations from these authors in *Attorney-General for Alberta v. Cook*, [1926] A.C. at pp. 460, 461, [1926] 2 D.L.R. at p. 773, [1926] 1 W.W.R. at p. 753. Why these authors should be quoted in the discussion of domicile in a modern conflict rule is difficult to understand.

(*n*) See notes (*e*) and (*f*), *supra*; *sed cf.* *Cook*, *Is Haddock v. Haddock Overruled* (1943), 18 Indiana L.J. 165.

What problems were thereby created as to property or support and maintenance, we do not know. North Carolina, for good or ill, has a strict policy as to divorce. The situation is contrary to its laws, and it has attempted to vindicate its own law by convicting the parties of bigamy.

In the criminal proceedings in North Carolina the jury's verdict of guilty was a general one, which of course did not disclose whether the verdict was based on the supposed invalidity of the Nevada divorce decrees or on other grounds, and consequently the Supreme Court of the United States, reviewing a judgment of the Supreme Court of North Carolina affirming the conviction, was obliged to pass upon the question whether the divorce decrees must be recognized in North Carolina under the Full Faith and Credit Clause. I do not venture to express any opinion on the scope of the famous clause, or upon the proposition quoted with approval by the Supreme Court of the United States that the "very purpose" of the clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation," but the facts of the *Williams* case seem to render it a peculiarly unfortunate one in which to expound and apply the policy of the clause in its extreme form.

Each of the Nevada decrees was based upon a finding that "the plaintiff has been and is now a bona fide and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law" — the relevant Nevada statute having provided that divorce might be obtained by complaint "to the district court of any county . . . in which the plaintiff shall reside . . . or if plaintiff shall have resided six weeks in the state before suit be brought . . ." The judgment of the majority of the Supreme Court of the United States says that the findings made in the divorce decree "must be treated on the issue before us as meeting" the requirement that domicile of the plaintiff is "essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance," — "For," says the judgment, "it seems clear that the provision of the Nevada statute that a plaintiff in this type of case must 'reside' in the state for the required period requires him to have a domicile as distinguished from a mere residence

in the state." All this would seem to furnish a flimsy basis for basing the validity of the Nevada decrees throughout the United States on the domicile of the plaintiffs in Nevada, and it is sufficient for the present purpose to refer to the devastating criticism expressed in the dissenting judgment of Jackson J. It is, however, stated in the judgment of the majority that North Carolina did not seek to sustain the judgment below on the ground that the plaintiffs were not domiciled in Nevada, and, because the jury's verdict in the North Carolina proceedings was a general one, the majority of the Supreme Court of the United States seemed to be obliged to decide the constitutional question without any serious discussion of the question of domicile. Obviously, if a case should arise in which the facts are substantially similar to the *Williams* case except that North Carolina distinctly raises the issue of domicile, and attacks the alleged Nevada domicile as being a sham, and the issue is not confused by a general verdict, the Supreme Court might without difficulty distinguish the *Williams* case. As it stands the judgment of the majority of the court in the *Williams* case has an air of unreality, reminiscent of Alice's Adventures in Wonderland. The court, having come to the conclusion that it was not at liberty to form an independent opinion as to the reality or unreality of the Nevada domicile, or that it must assume the reality of that domicile, then proceeds with apparent seriousness to speak of the right or power of Nevada with regard to "its domiciliaries." The conclusion seems to be perfectly logical, if the premise of Nevada domicile is assumed, but seems to be absurd as applied to the facts relating to domicile — even as those facts are coldly recited in the judgment of the majority, and without reference to the warmth of social consciousness manifested in the dissenting judgment of Jackson J. when he discusses the same facts. In conclusion, the dissenting judgment of Murphy J. includes the following passage:

In recognition of the paramount interest of the state of domicile over the marital status of its citizens, this court has held that actual good faith domicile of at least one party is essential to confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the Full Faith and Credit Clause (o), even though both parties personally appear (p). When the doctrine of those cases is applied to the facts of this one, the question becomes a simple one: Did petitioners acquire a bona fide domicile in Nevada? I agree with my

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(o) *Bell v. Bell* (1901), 181 U.S. 175.

(p) *Andrews v. Andrews* (1903), 188 U.S. 14.

brother Jackson that the only proper answer on the record is, no. North Carolina is the state in which petitioners have their roots, the state to which they immediately returned after a brief absence just sufficient to achieve their purpose under Nevada's requirements. It follows that the Nevada decrees are entitled to no extraterritorial effect when challenged in another state.

*Williams v. North Carolina Redivivus*

In the foregoing comment on *Williams v. State of North Carolina* (a), I pointed out that the case is not only a leading case on the constitutional law of the United States, but is, by reason of the doctrine of *Armitage v. Attorney-General* (b), also important with regard to the recognition of foreign divorces in England and Canada and elsewhere in the Anglo-Dominion legal world (c). The case may now be conveniently called *Williams I*, because on May 21, 1945, the Supreme Court distinguished it, and reached a different conclusion in another case bearing the same name (d) arising between the same parties, which may conveniently be called *Williams II* (e).

By way of justification for my venturing to make even a brief voyage into the troubled waters of American constitutional law, it seems prudent to remind Canadian readers again of the doctrine stated by an able and experienced English divorce judge (Sir Gorell Barnes, afterwards Lord Gorell) in *Armitage v. Attorney-General*, already cited. The doctrine is that a divorce decreed by a court which is not that of the husband's domicile will nevertheless be recognized in England if it appears that it would be recognized by a court of the domicile. In the particular case the English court held that the husband was domiciled in New York when a divorce was decreed in South

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(a) (1942), 317 U.S. 287, 63 Supreme Court Reporter 207.

(b) [1906] P. 135; cf. chapter 40, § 6(b).

(c) This was pointed out by Tuck, *Can We Afford to Ignore the American Law of Divorce* (1944), 22 Can. Bar Rev. 62.

(d) *Williams et al. v. State of North Carolina* (1945), 325 U.S. 226, 65 Supreme Court Reporter 1092.

(e) These convenient short titles are used in an article by Corwin, *Out-Haddock Haddock* (1945), 93 U. of Penn. L. Rev. 341, in which the decision in *Williams II* is vigorously criticized. Other articles which have already been published and which discuss *Williams II* include Lorenzen, *Extraterritorial Divorce: Williams v. North Carolina II* (1945), 54 Yale L.J. 799; Powell, *And Repent at Leisure: an Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder* (1945), 58 Harv. L. Rev. 930; Husserl, *Some Reflections on Williams v. North Carolina II* (1946), 32 Virginia L. Rev. 555.

Dakota. It was not suggested that a New York court was bound to recognize the divorce, but the English court found, probably erroneously (*f*), that the divorce would be recognized in New York. Obviously, if it were proved in an English court, not merely that a court of the husband's domicile would recognize the divorce decree elsewhere, but that it would be bound in accordance with the constitutional law of the United States to recognize the divorce, it would follow *a fortiori* that an English court would recognize the divorce. It may I think be assumed that a Canadian court ought to and would apply the doctrine of the *Armitage* case, and therefore it is of interest to Canadians to know something about the latest phase of American constitutional law relevant to the recognition in one state of the United States of a divorce obtained in another state of the United States.

The question whether a divorce obtained in one state of the United States must be recognized in another state of the United States is a question of constitutional law, depending on the construction, by the Supreme Court of the United States, of what is commonly called the "full faith and credit clause" (Article 4, section 1) of the Constitution of the United States, which is as follows:

Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof (*g*).

Between 1906 and 1942 the leading case relating to this question was *Haddock v. Haddock* (*h*) which was the subject

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(*f*) The probable error of the English court as to New York law does not of course affect the principle of the decision; *cf.* chapter 40, § 6(*b*).

(*g*) By an Act of Congress of May 26, 1790, it is provided that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

(*h*) (1906), 201 U.S. 562. The facts have already been stated in the first part of the present chapter, where I ventured to suggest that the English doctrine, rejected in the *Haddock* case, is more difficult to defend from a social point of view than the doctrine of the *Haddock* case, and furthermore, notwithstanding the overruling of the *Haddock* case in *Williams I*, that the American doctrine that husband and wife may in some circumstances have separate domiciles compares favourably with the doctrine expounded by English courts and by the House of Lords and the Privy Council that in all circumstances the wife's domicile is that of her husband.

of much controversial writing in the United States (i). It being clear that a decree of a court of the common domicile of the parties in one state must be recognized in other states, and that in some circumstances a decree of a court of the domicile of one of the parties in one state must be recognized in other states, there is not general agreement as to the circumstances in which a decree of a court of a state in which only one of the parties is domiciled is entitled to recognition in other states. One of the facts in *Haddock v. Haddock* was that the husband wrongfully deserted the wife in their common domicile, their "matrimonial domicile", in New York, acquired a new domicile in Connecticut, and obtained a divorce there. The Supreme Court held that the divorce was not one which must be recognized in New York. Whether the ground of decision was solely the fact that the desertion was wrongful is immaterial, because the *Haddock* case was expressly overruled in *Williams I*, and the court in the latter case expressly disapproved of the theory that the jurisdiction of the court of the domicile of one of the parties depends on the absence of fault of the party domiciled there.

In both *Williams I* and *Williams II* most of the basic facts were the same. Williams deserted his wife and children in North Carolina, and Mrs. Hendrix deserted her husband in North Carolina. Each of them fulfilled the residence requirements of the law of Nevada and obtained a divorce there. They were married to each other there, and then returned to North Carolina and there lived together as man and wife. They were twice prosecuted and convicted for bigamous cohabitation under a North Carolina statute. On the first occasion, the Supreme Court of the United States held that the Nevada divorces must be recognized in North Carolina, and consequently the accused were not guilty. This result followed from the facts that the State of North Carolina, relying upon *Haddock v. Haddock*, did not in the first criminal proceedings directly assert that none of the parties to the divorces was domiciled in Nevada, and that the course of the proceedings seemed to the majority of the members of the Supreme Court to oblige them to assume the existence of a Nevada domicile. The State of North Carolina then prosecuted the parties again for their continued bigamous cohabitation, and mended its fences by submitting to the jury

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(i) A partial list of articles is given in Cook, *Logical and Legal Bases of the Conflict of Laws* (1942) 462. See also discussion in 1 Beale, *Conflict of Laws* (1935) 497 ff.; Goodrich, *Conflict of Laws* (2nd ed. 1938) 340 ff.; Stumberg, *Conflict of Laws* (1937) 272 ff.

the question of domicile and obtaining a finding that the parties were domiciled in North Carolina and not in Nevada at the time of the divorces, and in the Supreme Court attacking the alleged Nevada domicile as a sham. The Supreme Court in *Williams II* held that the Nevada were not divorces which must be recognized in North Carolina. The conviction was therefore affirmed.

Thus the Supreme Court has affirmed the doctrine that the domicile of at least one of the parties in a state is essential to found the jurisdiction of a court of that state to decree a divorce which must be recognized in other states under the full faith and credit clause. And this is so notwithstanding that the clause itself says nothing about jurisdiction, but provides that the Congress may "prescribe" the "effect" of judicial proceedings, and that an Act of Congress provides that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken" (j).

Furthermore, in *Williams II* the Supreme Court has stated that a divorce decree is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and that domicile is a jurisdictional fact. The finding of a Nevada domicile by the Nevada court was entitled to respect, and more. It was not conclusive, because otherwise a court's record would establish its power. It did, however, impose on North Carolina a heavy burden of proof, but, in the opinion of the Supreme Court, this burden was discharged, and the finding of the North Carolina jury that the parties to the divorces were domiciled in North Carolina was amply supported in evidence (k).

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(j) See note (g), *supra*. Corwin, *op. cit.* (note (e), *supra*) 341, 344, submits that *Williams II* adds another to the long line of decisions reaching back nearly a century, proceeding from an unwarranted assumption of power by the court — a course of decision which has gradually eroded the full faith and credit clause and the implementing Act of Congress.

(k) In the new prosecution the trial judge instructed the jury that the decisive issue before them was whether the defendants had ever given up their domicile in North Carolina and acquired a new one in Nevada; for if they had not, then they were never lawfully divorced from their previous spouses, and their continued cohabitation in North Carolina was bigamous. "Domicile" the court described as the place where a person "has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home either permanently or for an indefinite or unlimited length of time." Proceeding under this instruction

The decision in *Williams II* would seem to be justifiable, because the case was an extreme one, it being manifest that all the parties were at the time of the divorces domiciled in North Carolina, and that Williams and Mrs. Hendrix had gone to Nevada merely for the purpose of fulfilling the residence requirements of Nevada law, and had then returned to the state of their domicile. It is of course easy to predict that cases will arise in the future in which the evidence as to domicile will be less clear, and that the Supreme Court will have the difficult task of deciding whether a strict divorce state such as North Carolina has succeeding in discharging the burden of proof imposed on it by a finding of domicile in an easy divorce state such as Nevada. Therefore, an English or Canadian court, in considering the applicability of the doctrine of *Armitage v. Attorney-General*, must not assume too readily that a divorce obtained in a state of the latter type need not be recognized in a state of the former type. Furthermore, it must be borne in mind that some states of the United States are more willing than North Carolina or New York are to recognize divorces obtained in Nevada or elsewhere on the basis of relatively short periods of residence, and that the doctrine of the *Armitage* case requires merely that the divorce be one which would be recognized by a court of the domicile, and does not require that the divorce be one which must be recognized by a court of the domicile.

I am of course aware that to an American constitutional lawyer my discussion of the *Haddock* case and of the two *Williams* cases will seem an over-simplification of the problems involved in these cases. The dissenting judgments in *Williams II* are crammed with controversial material, of which writers in the United States will doubtless make ample use. Whatever may be the ultimate evolution of American constitutional law in this connection, the result will be of concern to English and Canadian courts by reason of the doctrine of the *Armitage* case.

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the jury found the defendants guilty, and the latter again appealed to the Supreme Court for protection under the "full faith and credit" clause. But this time the court failed them. Cf. Corwin, *op. cit.* (note (e)), *supra* 342, 343.

## CHAPTER XLII.

### VOIDABLE MARRIAGE AND ANNULMENT JURISDICTION\*

The case of *Easterbrook v. Easterbrook* (a) decided by Hodson J. on an undefended petition for annulment of marriage, involves an important point, and it is regrettable that in the circumstances there was no opportunity for the matter to be considered by an appellate court. The case of *Inverclyde v. Inverclyde* (b), decided by Bateson J., after full argument on behalf of both parties and reservation of judgment, was somewhat casually dissented from by Hodson J., who preferred to follow the much criticised case of *White v. White* (c), decided by Bucknill J. on an undefended petition.

The petitioner in the *Easterbrook* case was a soldier serving in the Canadian forces in England, who, as alleged in the petition and found by the court, was "domiciled in Canada" (that is, was domiciled in one of the provinces of Canada). Both petitioner and respondent were held to be resident in England at all material times. The respondent was held to be domiciled in England, but inasmuch as the marriage was not alleged to be void *ab initio*, but was alleged to be voidable by virtue of s. 7 (1) (a) of the Matrimonial Causes Act, 1937, (that is, because "the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage") (d), it seems impossible to avoid the conclusion that the respondent's domicile was that of her husband. It seems to be clear that a court of the Canadian province in which both parties were domiciled would have had jurisdiction to entertain a suit

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\*This reproduces two case comments published (1944), 22 Canadian Bar Review 464-468, and 923-926.

(a) [1944] P. 10.

(b) [1931] P. 29.

(c) [1937] P. 111. For critical comments, see J.H.C.M. (1937) 53 L.Q. Rev. 315; Kahn-Freund, in Annual Survey of English Law (1937) 320, 322; Cheshire, Private International Law (2nd ed. 1938) 22, 342, 343; T.C.T. (1938) 6 Cambridge L.J. 424; Hancock (1943), 21 Can. Bar Rev. 149, at pp. 154, 155.

(d) Held, before the passing of the statute, not to be a ground for annulling a marriage: *Napier v. Napier*, [1915] P. 184 C.A.

for annulment of the marriage, and if that court annulled the marriage, its judgment would be recognized as valid in England: see *Salvesen or von Lorang v. Administrator of Austrian Property (e)*. The question in the *Easterbrook* case was, however, a different one, namely, whether the English court had concurrent jurisdiction, based on residence. It is desirable that occasionally a single judge should refuse to follow an earlier decision of a single judge (*f*), but in that event it is both desirable and decorous that the later judgment be a reasoned judgment, adequately stating the grounds of dissent from the earlier judgment. In the *Easterbrook* case Hodson J., after mentioning that counsel for the petitioner had drawn his attention to the *von Lorang*, *Inverclyde* and *White* cases, continued as follows:

As in *White v. White*, so in this case, there has been no appearance and no protest to the jurisdiction, and I am unable, with all respect to Bateson J., to see the distinction for the purpose of jurisdiction which he appears to have drawn in *Inverclyde v. Inverclyde* between voidable and void marriages. In my judgment, on the facts of this case I have jurisdiction, as there was held to be jurisdiction in *White v. White*, to pronounce a decree of nullity on the grounds set out in the petition. There will be a decree nisi.

The learned judge's selection of the *White* case as a precedent was peculiarly unfortunate, because in that case the respondent was neither resident nor domiciled in England, and the marriage had not been celebrated there, so that none of the three bases of jurisdiction stated in Dicey's rule 65 (*g*) existed, and the case illustrates the inclination of English courts to extend their jurisdiction in undefended annulment cases. In the *Easterbrook* case, however, the marriage had been celebrated in England and the respondent was resident there, so that the case came well within Dicey's rule, provided of course that, as Hodson J. held, there is no distinction between void and voidable marriages as regards jurisdiction.

The decision in the *Inverclyde* case may be right or may be

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(e) [1927] A.C. 641; cf. the discussion of this case in chapter 40, §§ 7 and 8.

(f) Allen, *Law in the Making* (2nd ed. 1930) 154; Goodhart, *Precedent in English and Continental Law* (1934), 50 L.Q. Rev. 40, at p. 42.

(g) Applied by the Court of Appeal for Manitoba in *Hutchings v. Hutchings* (1930), 39 Man. R. 66, [1930] 4 D.L.R. 673, [1930] 2 W.W.R. 565, and by the Court of Appeal for Ontario in *Manella v. Manella*, [1942] O.R. 630, [1942] 4 D.L.R. 712, and comment by Hancock (1943), 21 Can. Bar Rev. 149; cf. chapter 40, § 7.

wrong, but Bateson J.'s carefully reasoned judgment (*h*) certainly deserves a better fate than to be summarily dissented from without reasons in a judgment on an undefended petition. The marriage was celebrated in England in 1929, and in 1930 the woman sued in England for a declaration of nullity of the marriage on the ground of the impotence of the man, alleging in her petition that she was domiciled in Scotland and resident in England, and that he was domiciled in Scotland and had places of residence in England and Scotland. The respondent appeared under protest on the ground that the court had no jurisdiction. The argument for the respondent, accepted as "sound" by Bateson J., was that impotence differs from other grounds of nullity, such as illegality or informality, as regards annulment jurisdiction. If, for example, a marriage is bigamous, or if any essential element is lacking in the formalities of celebration, a declaration of nullity is merely the judicial ascertainment of a fact, namely, that there never has been any marriage; the marriage is void *ab initio* without regard to the intention or desire of the parties to affirm it or impeach it. On the other hand, impotence is merely a ground upon which one of the parties to the marriage may, if he or she chooses, and as a general rule, obtain an annulment decree; the marriage is voidable, not void, and unless already voided, becomes unimpeachable on the death of either party. In the case of a voidable marriage, a so-called nullity decree is really a decree dissolving an existing marriage, and changing the status of the parties, and consequently if the principle is sound that domicile is the sole basis of divorce jurisdiction, the same principle is applicable to annulment for impotence. Bateson J. therefore dismissed Lady Inverclyde's petition.

In the 5th edition (1932) of Dicey's Conflict of Laws Keith, in deference to the *Inverclyde* case, added to Dicey's rule 65 the following clause:

(2) Where a declaration is sought on the score of impotence, the court has jurisdiction only where the parties to the marriage are domiciled in England (*i*).

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(*h*) *Inverclyde v. Inverclyde*, [1931] P. 29, followed in Manitoba in *W. v. W.* (1934), 42 Man. R. 578, [1934] 3 W.W.R. 230, and in Ontario in *Fleming v. Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90; cf. chapter 40, § 7.

(*i*) Keith criticizes the doctrine on the ground that it "may work much injustice" if the domicile is foreign, and says that it "led to an invalid divorce secured by Lady Inverclyde in America."

The suggested analogy between a divorce decree and annulment of a voidable marriage, while it may be sufficient for the purpose of jurisdiction, as held in the *Inverclyde* case, is not perfect. The divorce decree presupposes a valid marriage, dissoluble by purely statutory authority for cause occurring after the celebration of the marriage. The decree is of course not retroactive and does not affect the legitimacy of the children of the marriage. The annulment decree, however, presupposes an impediment existing at the time of the celebration of the marriage (*j*), and even if the marriage is said to be voidable, this meant, under the former practice, that it was valid in a civil court unless, before the death of either party, it was annulled by an ecclesiastical court. If so annulled, it was in effect declared void *ab initio* and the children of the marriage were retroactively rendered illegitimate, but after the death of either party the civil court would restrain the ecclesiastical court from annulling the marriage, because the only effect of annulment would be to bastardize the children (*k*). This doctrine of a marriage being "voidable" by reason of a canonical impediment formerly applied also to a marriage within the prohibited degrees and constitutes the background for Lord Lyndhurst's Act (*l*). That statute recited that "marriages within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto," and enacted that "all marriages which shall hereafter be celebrated between parties within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever." In effect, what had been a canonical impediment, rendering a marriage voidable in the sense already explained, became as a result of the statute a civil impediment, rendering the marriage void.

Three months after the decision in the *Inverclyde* case, and without mentioning that case, Lord Merrivale gave judgment in *Newbould v. Attorney-General* (*m*). The petitioner, who was born on April 23, 1929, prayed by his father as guardian

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(*j*) This is of course inapplicable to the statutory ground in question in the *Easterbrook* case, *supra*.

(*k*) Cf. Bishop, *Marriage, Divorce and Separation* (1891), §§ 259, 265, 267, 277; Eversley, *Domestic Relations*, chapter 3 (Impediments to Marriage).

(*l*) The Marriage Act, 1835 (5 & 6 W. 4, c. 54); cf. *Brook v. Brook* (1861), 9 H.L.C. 193, 5 R.C. 783. See chapter 40, § 9.

(*m*) [1931] P. 75.

*ad litem* for a declaration under the Legitimacy Act, 1926, that he was legitimated from the date of the subsequent marriage of his father and mother on November 30, 1929. The only obstacle to the making of the declaration was that the father had married another woman in 1909, and that this marriage was annulled on the ground of the impotence of the woman on November 25, 1929, that is, after the petitioner's birth, and it is provided by the Legitimacy Act, 1926, s. 1 (2) that

Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

Lord Merrivale overcame this obstacle by holding that the annulment in 1929 of the marriage of 1909 operated retroactively so as to amount to a declaration that there had been no marriage, and therefore the petitioner was legitimated. The case was a domestic English case, not involving any question of the conflict of laws or any question of jurisdiction such as that which was the subject of the *Inverclyde* case.

In deciding that the annulment operated retroactively so as to legitimize the petitioner, Lord Merrivale doubtless consoled himself with the thought that there was no child of the marriage who would be rendered illegitimate by the retroactive operation of the annulment — the ground of the annulment being the impotence of the woman. *Mirabile dictu*, it appears from the recent judgment of Pilcher J. in *Clarke v. Clarke* (n) that it is possible for a marriage to be annulled on the ground of the impotence of the woman notwithstanding that the woman has borne a child of whom the man is the father — the rare case of *fecundatio ab extra*. The learned judge who annulled the marriage did not say that the annulment was retroactive, but on the other hand he did not say anything to negative the applicability of the old doctrine, reaffirmed in the *Newbould* case, that annulment for impotence is retroactive, and did not suggest any theory by which the unfortunate child might be declared legitimate.

#### *The Easterbrook and Hutter Cases*

As is related in the foregoing comment on *Easterbrook v. Easterbrook* (o), an English court (Hodson J.), on an undefended petition by a man for the annulment of his marriage with the respondent, held that it had jurisdiction and annulled

(n) [1943] 2 All E.R. 540, 112 L.J. P. 41, 168 L.T. 62.

(o) [1944] P. 10.

the marriage. The significant facts were as follows: (1) both parties were held to be resident in England, the petitioner being a soldier serving in the Canadian forces in England; (2) the petitioner was held to be "domiciled in Canada" — an obviously inaccurate judicial mode of saying that he was domiciled in one of the provinces of Canada (*p*); (3) the ground of annulment was that the marriage had not been consummated owing to the wilful refusal of the respondent to consummate it — a ground which was created by the Matrimonial Causes Act, 1937, but which before the passing of that statute was not a ground of annulment by English law (*q*), and is not a ground of annulment by the law of any province of Canada.

Although annulment of a marriage voidable by reason of a canonical impediment, such as impotence, operates retroactively so as to render the marriage void *ab initio* (*r*), based, as it is, upon an impediment existing at the time of the marriage, it seems clear that an annulment based on the new statutory ground of wilful refusal to consummate the marriage is operative only *a praesenti*, and it follows from the fact of an existing marriage until annulled that at the time of the petition for annulment the domicile of the respondent in the *Easterbrook* case was that of her husband, the petitioner, namely, in one of the provinces of Canada.

Even if it is assumed that the English court had jurisdiction to entertain a petition for the annulment of the *Easterbrook* marriage, it is not clear what justification it had for applying English domestic law concerning the ground for annulment to the case of a husband and wife, neither of whom was domiciled in England. The point was not noted by me in my former comment, but was discussed in a learned comment in the Law Quarterly Review (*s*), as follows:

A further point may be raised by cases like *Easterbrook v. Easterbrook*, where it is not the court of the domicile which decides the issue. This is the question what law is to be applied to the decision of the case. In the [*Easterbrook*] case English law was applied (s. 7(1), Matrimonial Causes Act, 1937), but counsel for the petitioner did not plead foreign law, and the report does not state whether the court applied English law *qua lex fori*, *lex loci celebrationis*, or law of the respondent's domicile, or whether English law was ap-

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(*p*) *Attorney-General for Alberta v. Cook*, [1926] A.C. 444, [1926] 2 D.L.R. 762, [1926] 1 W.W.R. 742.

(*q*) *Napier v. Napier*, [1915] P. 184.

(*r*) See note (*m*), *supra*.

(*s*) F. H. (1944), 60 L.Q. Rev. 115, at p. 116.

plied as the law of the petitioner's domicile following the maxim that in the absence of proof to the contrary foreign law is presumed to be the same as English law on the point in issue. It would be interesting to see what decision the court would give in a case where all other facts being the same as in *Easterbrook v. Easterbrook* counsel for the petitioner applied for a nullity decree on a ground not existing (t) in English law, but prevailing in the law of the petitioner's domicile. Perhaps the consideration of this problem may be an additional argument in favour of the adoption of exclusive jurisdiction in nullity cases by the court of the putative husband's domicile.

A striking parallel to the *Easterbrook* case is furnished by the later case of *Hutter v. Hutter* (u), decided by Pilcher J. The facts were similar: (1) both parties were held to be resident in England, the petitioner being a soldier in the United States army serving in England; (2) the petitioner was held to be "domiciled in the United States" — meaning that he was domiciled in one of the states of the United States (v); (3) the ground for annulment was the same as in the *Easterbrook* case, and, as it does not appear in what particular state the petitioner was domiciled, it is impossible to say whether the particular ground for annulment would be a ground for annulment by the law of the state of the petitioner's domicile.

Even if it is assumed that the English court had jurisdiction to entertain a petition for the annulment of the marriage, the same doubt occurs as occurred in the *Easterbrook* case, namely what justification the court had for applying domestic English law to the case of a husband and wife, neither of whom was domiciled in England. If the question had been one of the formal validity of the marriage, the proper law governing that question would of course have been domestic English law, because the marriage was celebrated in England. The point apparently escaped the attention of Pilcher J., as he did not explain by what course of reasoning he decided that an English statutory ground for annulment, which may not have existed by the domiciliary law of the parties was applicable to the case. It is true that in a divorce case an English court or an Anglo-American court, assuming that it has jurisdiction, always applies the domestic law of the forum as regards the

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(t) *E.g.*, fundamental mistake in German law; see *Mitford v. Mitford*, [1923] P. 130.

(u) [1944] P. 95.

(v) The judge being guilty of an inaccurate statement similar to that of which the judge in the *Easterbrook* case was guilty. See note (p), *supra*.

ground of divorce (*w*). On the other hand, in an annulment case, a court should of course apply the proper law governing the particular ground of nullity, and should of course resort to a foreign law if that is the proper law (*x*). It is therefore rather disturbing that an English court in the *Easterbrook* and *Hutter* cases seems to have applied English domestic law without even mentioning the possibility that the proper law might be the law of the domicile of the parties.

Next, as to the jurisdiction of the court, it is to be noted that although the *Hutter* petition, like the *Easterbrook* petition, was undefended, Pilcher J. in the *Hutter* case came to the conclusion that it was undesirable for him to decide the case without having the matter fully argued, and accordingly he caused the papers to be forwarded to the King's Proctor in order that he might instruct counsel. Subsequently counsel for the King's Proctor appeared, and the judge "had the advantage of listening to a full analysis of all the relevant authorities by the Attorney-General himself."

In the result Pilcher J. availed himself of his undoubted privilege of refusing to follow the earlier decision of Bateson J. in *Inverclyde v. Inverclyde* (*y*), but at least he did so after full argument and after stating fully his reasons for doing so, as contrasted with Hodson J.'s somewhat casual manner of stating his disagreement with Bateson J.

The decision in the *Hutter* case is of course of great importance, because, if it is the law — as only a decision of an appellate court may some day tell us — it will necessitate the re-writing of much that has been written about nullity jurisdiction. The *Inverclyde* case said that in the case of a voidable marriage, as distinguished from a void marriage, only a court of the domicile has jurisdiction to annul the marriage (*z*), whereas the *Hutter* case says that there is no difference between void and voidable marriages as regards jurisdiction, and that jurisdiction in both cases may be exercised by a court of the country in which the parties are, or the respondent is, resident.

(*w*) Cf. chapter 8, § 5, at p. 171, note (o), *supra*.

(*x*) *E.g.*, if the ground of nullity is lack of essential formalities of celebration under the law of the foreign place of celebration, or if the ground of nullity is incapacity to marry under the law of the foreign domicile of the parties.

(*y*) [1931] P. 29, The *Inverclyde* case was followed in Manitoba and Ontario: see note (h), *supra*.

(*z*) A brief account of the reasoning is given in my comment on the *Easterbrook* case, *supra*.

It may be respectfully questioned whether Pilcher J. is quite accurate when he says:

A marriage which is not consummated on the ground of wilful refusal is clearly voidable *in the same sense* (a) as a marriage which is not consummated by reason of the impotence of one of the parties to it.

As we have seen (b), voidable in the canonical sense means that the annulment is retroactive to the time of the marriage, whereas voidable on the statutory ground of wilful refusal to consummate the marriage cannot reasonably be construed in the same sense (c).

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(a) The italics are mine.

(b) See note (m), *supra*.

(c) Notwithstanding that in *S. v. S.*, [1944] 1 All E.R. 439, Bucknill J. treats both these cases of voidable marriages as analogous for the purpose of deciding that the wife's right to alimony *pendente lite* continues during the period between the decree *nisi* and the decree absolute, by way of contrast with the case of a decree *nisi* for divorce on the ground of the adultery of the wife.

## CHAPTER XLIII.

### TORT AT SEA: PHILLIPS v. EYRE IN QUEBEC\*

The decision of the Supreme Court of Canada in the case of *Canadian National Steamships Co.* (defendant, appellant) v. *Watson* (plaintiff, respondent) (a) is interesting, but somewhat disappointing in some respects.

The action was brought in the province of Quebec in respect of an alleged tort committed on board a British ship owned by the defendant company and registered at the port of Vancouver in British Columbia, the ship being at the time on the high seas on the way to Charlottetown in Prince Edward Island. By virtue of s. 265 of the Merchant Shipping Act, 1894, the case was to be governed by the law of the port at which the ship was registered, that is, the law of British Columbia. In its pleading and at the trial the defendant company relied upon the common law of England, and particularly upon the defence of common employment, the plaintiff being a member of the crew, and it being contended that the cause of action was based on the negligence of the chief officer of the steamship. The defendant's contention as to the applicability of the common law of England was met by s. 265 of the Merchant Shipping Act, 1894, and its reliance upon the law of British Columbia was met by its failure to plead the law of British Columbia, as distinguished from the common law of England, and by the consequent presumption that the law of British Columbia was the same as the *lex fori* (Quebec).

We are of course familiar with the general rule of English conflict of laws that if a party relies upon some provision of a foreign law as being the proper law governing a particular question in issue and alleges that it is different from the corresponding provision of the *lex fori*, he must prove the foreign law, and that in default of proof the foreign law is presumed to be the same as the *lex fori*. Presumptions are sometimes inevitable and sometimes useful, but sometimes they are unsatis-

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\*This chapter reproduces a case comment published (1939), 17 *Canadian Bar Review* 546-550. A further comment on the same case is reproduced in chapter 44.

(a) [1939] S.C.R. 11, [1939] 1 D.L.R. 273.

factory. It is, for example, unsatisfactory if the application of a presumption leads to a result which is unreal in the sense that it does not correspond with known fact. As between two common law countries a presumption of identity of laws is generally reasonable, because it corresponds, approximately at least, with fact, but the presumption ought not to be extended to changes in the common law made by statute. See, for example, *Pink v. Perlín & Co.* (b) and *Purdom v. Pavay* (c). Again, if the foreign law is not only technically a foreign law, but also essentially a foreign law, as, for example, if the *lex fori* and the foreign law are based on the common law and the civil law respectively, or *vice versa*, a presumption of identity of the two laws is quite likely to be unreal in the sense that it does not correspond with fact. If there exists in the English system of conflict of laws a presumption that foreign law is the same as the *lex fori*, universally applicable to all kinds of cases, then it is submitted that the existence of this presumption constitutes a defect in the system (d). Some alleviation of the rigidity of the rule is afforded if, on appeal, a case reaches an appellate court which is the common appellate forum of the two countries the laws of which are in question. On an appeal to the House of Lords from a Scottish court, English law, which was a matter of fact which required proof in the court below, becomes a matter of law in the House of Lords of which that House must take judicial notice, and the lack of proof of English law in the Scottish court becomes immaterial (e). Similarly on an appeal from a Quebec court to the Supreme Court of Canada, judicial notice must be taken of the law of British Columbia (f). This rule will not be applied, however, unless the "foreign" law is relied upon in the pleadings. Therefore in *Canadian National Steamships Co. v. Watson* (g) the

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(b) (1898), 40 N.S.R. 260, in which Meagher J. refused to assume that the Married Women's Property Act, recently enacted in Nova Scotia, had also been enacted in Ohio.

(c) (1896), 26 Can. S.C.R. 412, at p. 417, Strong C.J.: "Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law."

(d) For a criticism of the rigidity of the English rule, see especially Johnson, *Conflict of Laws*, vol. 1 (1933) 58 ff.

(e) *Cooper v. Cooper* (1888), 13 App. Cas. 88.

(f) As to the general principle, see *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195, at p. 201; *Logan v. Lee* (1907), 39 Can. S.C.R. 311; *Morrow Screw Co. v. Letang*, [1924] S.C.R. 470, [1924] 4 D.L.R. 89.

(g) The point is obscured by the extreme brevity of Duff C.J.'s

Supreme Court of Canada refused to take judicial notice of the law of British Columbia, and applied the presumption that British Columbia law was the same as Quebec law.

Again, in *Canadian National Steamships Co. v. Watson* it is categorically stated in the judgment of Duff C.J. (concurring in by Crocket, Kerwin and Hudson JJ.) that the result of *O'Connor v. Wray (h)* is that if an action is brought in the province of Quebec in respect of an alleged tort committed elsewhere, the governing rule of the conflict of laws is the same as that which prevails in the other provinces, namely, the famous formula stated by Willes J. in *Phillips v. Eyre (i)*:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

Strictly speaking, in *O'Connor v. Wray* there was a variety of judicial opinion on the construction of the Quebec and Ontario statutes respectively and on the question whether the owner of a motor car had subjected himself to the Ontario Highway Traffic Act by allowing his car to be driven by another person from the province of Quebec into the province of Ontario so as to render the owner liable in Quebec in respect of an accident occurring in Ontario, and the case is far from being on its face a simple application of the *Phillips v. Eyre* formula in Quebec conflict of laws. We have now, however, the statement of the majority of the Supreme Court of Canada that the result of *O'Connor v. Wray* is that the formula in question is part of Quebec conflict of laws (*j*).

The formula itself, notwithstanding that it was expressed in its exact form by the very learned Mr. Justice Willes, and has been applied by the highest authority in England and in Canada, does not clearly indicate what is the fundamental theory as to the law that governs liability in tort, but seems to hesitate between two theories. Willes J. himself said (*k*) that "the

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statement, but is clearly expressed by Cannon J., [1939] S.C.R. 11, at p. 18, [1939] 1 D.L.R. 273, at p. 278.

(*h*) [1930] S.C.R. 231, [1930] 2 D.L.R. 899.

(*i*) (1870), L.R. 6 Q.B. 1, at pp. 28-29.

(*j*) For a full discussion of Quebec case law on the point, see Johnson, *Conflict of Laws*, vol. 3 (1937) 342 ff. As to the later case of *McLean v. Pettigrew*, [1945] S.C.R. 62, [1945] 2 D.L.R. 65, see chapter 45.

(*k*) *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, at p. 28.

civil liability arising out of a wrong derives its birth from the law of the place [of the doing of the act], and its character is determined by that law." This would seem to suggest that the *lex loci delicti commissi* is primarily the proper law of the obligation (1), (in accordance on this point with the view generally prevailing in the United States that the existence and extent of tort liability are governed by the law of the place of wrong) (m), subject only to a proviso that no action will lie in England unless the act if committed in England would have been actionable there. It would appear, however, that the formula compels us to invert the emphasis and say that the domestic law of the forum defines the existence and extent of tort liability, subject only to the proviso that the act must not have been justifiable by the law of the place where it was done (n). On this basis, *Machado v. Fontes* (o) is simply an application of the formula, and does not support the proposition that damages in tort are procedural and are for that reason governed by the law of the forum. In *Livesley v. E. Clemens Horst Co.* (p) Duff C.J., delivering the judgment of the Supreme Court of Canada, held that damages for breach of contract are governed by the proper law of the contract, as being part of the substance of the obligation, and not governed by the *lex fori* as being procedural, and he expressed the opinion that damages in tort are likewise a matter of substance, not a matter of procedure. He intimated that the case of *Machado v. Fontes* would have to be considered in that connection if the occasion should arise. It is regrettable that when a good opportunity occurred in *Canadian Steamships Co. v. Watson* to write the sequel to *Livesley v. E. Clemens Horst Co.* and discuss the underlying principles governing tort liability in the conflict of laws, the chief justice did not avail himself of the opportunity, but merely fell back upon a stereotyped formula.

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(1) For an analysis of the judgment in *Phillips v. Eyre* and further discussion of the English doctrine with regard to tort liability in the conflict of laws, see chapter 2, § 1(3), at pp. 15, 16, *supra*.

(m) See chapter 2, § 1(2), at p. 11, *supra*, and chapter 45.

(n) For detailed analysis of this proposition, see chapter 2, § 1(3), at p. 17, *supra*.

(o) [1897] 2 Q.B. 231; see chapter 2, § 1(3), at pp. 18, 19, *supra*, and chapter 45.

(p) [1924] S.C.R. 605, [1925] 1 D.L.R. 159.

## CHAPTER XLIV.

### TORT; THE MERCHANT SHIPPING ACT; PHILLIPS v. EYRE\*

In my earlier comment (a) on *Canadian National Steamship Co. v. Watson* (b) I made some observations on the opinion expressed in that case that the formula stated by Willes J. in *Phillips v. Eyre* (c) was applicable to an action brought in the province of Quebec, and on the presumption to which effect was given in the *Watson* case that the "foreign" law in question was the same as the law of the forum. The present chapter contains some further observations suggested by the *Watson* case.

The majority of the judges in the Supreme Court expressed their agreement with the judges in the Quebec courts that s. 265 of the Merchant Shipping Act, 1894, applied to the case. The section is as follows:

265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

There being "no such provision", and the ship being registered at the port of Vancouver, the section, as applied to the case, seems to say, in effect, that "the case shall be governed by the law of British Columbia."

The net result seems to be that in the opinion of the majority of the Supreme Court of Canada in the *Watson* case both the *Phillips v. Eyre* formula and s. 265 of the Merchant Shipping Act, 1894, are to be applied. Consequently, the provision of the Merchant Shipping Act must be read along with the formula, and, so to speak, fitted into it, and in a case in which there

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\*This chapter reproduces a case comment published (1940), 18 Canadian Bar Review 308-314, in continuation of the comment reproduced in chapter 43.

(a) See chapter 43.

(b) [1939] S.C.R. 11, [1939] 1 D.L.R. 273.

(c) (1870), L.R. 6 Q.B. 1, at pp. 28-29. The formula is quoted in chapter 43.

is no actual *locus delicti commissi* in the sense of a country with a system of law (because the alleged tort was committed on the high seas), the court is obliged artificially to say that the *locus* in question was British Columbia, in order to give some meaning to the second condition in *Phillips v. Eyre* as applied to the particular case. It is submitted, however, that another view might reasonably have been adopted, namely, that if an alleged tort is committed on a ship, a court of any country in which s. 265 of the Merchant Shipping Act is in force and applicable is bound to give effect to the special statutory conflict rule by which the case is to be governed by the law of the country (province) in which the port of registry is situated, and must disregard the *Phillips v. Eyre* formula (which, in a case not governed by the statute, requires a court to take into consideration both the *lex fori* and the *lex loci delicti commissi*) and must, subject of course to a reservation in favour of any rule of stringent public policy of the forum, decide the case with sole reference to the law of the port of registry. The argument for the suggested construction of the statute is especially strong if the ship is on the high seas at the time of the commission of the alleged tort, but if the construction is right in the case of a ship which is on the high seas, it would appear to be also right in the case of a ship which is in territorial waters. Whether the suggested construction is right or wrong, the matter would seem to be one which might well have been discussed by the court. It would be interesting to learn by what course of reasoning effect is supposed to be given to a statute which says that the case is governed by the law of British Columbia, when the court applies the law of British Columbia on the question whether the act was or was not justifiable by the law of the place where it was done (that is, on the high seas) and applies the law of Quebec on the question whether the wrong was of such a character that it would have been actionable if committed in Quebec.

The other point is what is the exact meaning of the *Phillips v. Eyre* formula itself. The first condition stated in the formula is the subject of an interesting article (*d*). The author of that article does not mention the suggestion made elsewhere (*e*) that the result of the formula as a whole, as construed by

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(*d*) Hancock, *Torts in the Conflict of Laws: The First Rule in Phillips v. Eyre* (1940), 3 U. of Toronto L.J. 400.

(*e*) The point is discussed in chapter 2, § 1(3), at p. 17, *supra*, and chapter 45.

the courts, may be that in English conflict of laws the existence and extent of tort liability are defined by the law of the forum, that is, the domestic rules of that law, subject only to a proviso that the act must not be justifiable by the law of the place where it was done. On the contrary, he stresses Willes J.'s use of the word "wrong" in the first condition in *Phillips v. Eyre* as contrasted with his use of the word "act" in the second condition, and suggests that the "act" is purely factual, while the "wrong" is the legal effect of the "act" as defined by the law of the place where the act was done, the "wrong," if any, being, as Willes J. states in an earlier part of his judgment, the creature of that law. What is not clear, however, is whether there is any real significance in the change from "wrong" in one condition to "act" in the other condition. It is true that Willes J. states in one part of his judgment a theory of the creation of a tort obligation by the law of the place where the act is done, but when he comes to state the English conflict rules applicable to an action in England in respect of an alleged wrong committed abroad, he does not pursue logically his theory of a foreign created right. In fact the only clear reference to the foreign law so far as his two conditions are concerned is to be found in his second condition, in which on his own theory we might have expected him to refer to the "wrong" defined by the foreign law, whereas any theory of a foreign created right which he might have had in his mind appears only in the extremely attenuated form that the act must not be justifiable by the foreign law. In the light of his second condition, his use of "wrong" instead of "act" in his first condition may not have any particular significance, and the natural construction of his first condition would seem to be that it is directed solely to the applicability of the *lex fori*, the only question as to his first condition being what is the situation actual or hypothetical, to which the *lex fori* is to be applied.

The second condition expresses a conflict rule of the law of the forum referring to a foreign law, and the reference may of course be to the domestic rules of the foreign law or may be a reference to the whole law, including the conflict rules or other rules of that law, with the object of ascertaining what a court of the foreign country would decide in the actual situation (f). The first condition expresses a conflict rule of the

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(f) This question as to the meaning of a conflict rule has been

law of the forum referring to the law of the forum, and necessarily the reference is to the domestic rules of the law of the forum. On this view of the meaning of the first condition, it would not appear to make any difference whether, in the case of an alleged wrong, we say that the "act" must have been one which would have been an actionable wrong if done in England, or say that the wrong must be of such a character that it would have been actionable if committed in England. Under the rule as expressed in either of these forms, the act, in fact done abroad, and which in the circumstances in which it was done in the foreign country may be an actionable wrong by the law of that country, must be hypothetically transferred to the country of the forum and be supposed to have been done there in similar circumstances. I take as examples some of the cases discussed in the article above mentioned (*g*).

In *The Halley* (*h*) the shipowner was vicariously liable in Belgium for the tort committed in Belgium by a pilot compulsorily employed by the owner under Belgian law, and the similar situation to which English law would be applicable under the first condition in *Phillips v. Eyre* would be a tort committed in England by a pilot compulsorily employed by the shipowner under English law. In that hypothetical English situation the owner would not have been vicariously liable by domestic English law, and therefore no action lay against the owner in England in respect of the tort committed in Belgium (*i*).

Again, in *Potter v. Broken Hill Proprietary Association* (*j*) an action was brought in Victoria by the owner of a New South Wales patent for the alleged unlawful use of the patented invention in New South Wales. The similar hypothetical sit-

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discussed in chapter 2, the effect of the second condition in *Phillips v. Eyre* being discussed in § 1(3) of that chapter, at pp. 17, 18, *supra*.

(*g*) *Hancock, op. cit., supra*, note (*d*).

(*h*) *Liverpool, Brazil, and River Plate Steam Navigation Co. v. Benham* (1868), L.R. 2 P.C. 193.

(*i*) There are some expressions in the judgment in the Privy Council indicating that the action was dismissed because the right of action existing by Belgian law was contrary to some stringent rule of English public policy — a view which is weakened by the fact that since the coming into force of s. 15 of the Pilotage Act, 1913, a right of action similar to the Belgian right is recognized by the law of England. Cf. *The Chyebassa*, [1919] P. 201; *The Arum* [1921] P. 12. In any event Willes J.'s reference to *The Halley* does not suggest that he cited the case on the point of any stringent rule of local public policy.

(*j*) [1905] Vict. L.R. 612.

uation to which the law of Victoria would be applied under the first condition in *Phillips v. Eyre* would seem to be that of the use by the defendant in Victoria of an invention covered by a Victorian patent owned by the plaintiff (*k*). Whether the defendant was justified in what he did by the law of New South Wales would seem to be a question to be answered under the second condition by reference to the law of New South Wales, and it is difficult to understand why A'Beckett J. thought that the "existence of a privilege conferred on the plaintiff" by the law of New South Wales was an element in the situation to which the law of Victoria was to be applied under the first condition. On the other hand, it is submitted that Hood J. was also in error in saying that the "wrong" which must be actionable in Victoria if committed in Victoria under the first condition was the infringement of a New South Wales patent, instead of being a hypothetical infringement of a Victorian patent. In the result, on the meaning of the first condition in *Phillips v. Eyre*, A'Beckett J. thought the plaintiff should succeed, and Hood J. thought the defendant should succeed, while on another ground Hodges J. agreed with Hood J. against A'Beckett J., namely, that the action in respect of the infringement of the New South Wales patent was local, not transitory, and therefore the Victorian court had no jurisdiction (*l*).

In the case of *Panageorgiou v. Turner* (*m*) a United States immigration officer was sued in New Brunswick for false imprisonment, the act of detention having been done in the State of Maine. The hypothetical situation to which the law of New Brunswick would be applicable under the first condition in *Phillips v. Eyre* would, it is submitted, not be the actual situation of detention by a United States officer, but the similar situation of detention by a Canadian officer in Canada of a person seeking admission to Canada. The question whether a United States officer would be protected from liability was a

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(*k*) In fact this hypothetical situation was the actual situation in respect of which the plaintiff, by other paragraphs of his statement of claim, claimed a remedy in the same action.

(*l*) Read, *Recognition and Enforcement of Foreign Judgments* (1938) 195-198, criticizes this ground of decision, concluding with the submission that the application in the *Potter* case of the restrictive effect of the "local-action" doctrine "was, if not an unnecessary refinement, a result to be deplored both theoretically and practically."

(*m*) (1906), 37 N.B.R. 449.

question to be answered under the second condition and the question whether a Canadian officer would be protected from liability was a question to be answered under the first condition.

The case of *Simonson v. Canadian Northern Ry. Co.* (n) would seem to be an example of a manifestly erroneous construction of the relevant conflict rule. A workman was injured in the course of his employment. The injury was caused by the negligence of a fellow servant, and both in Saskatchewan, where the injury occurred, and in Manitoba, where the action was brought, statutes had been passed depriving an employer of the common law defence that the injury resulted from the negligence of an employee engaged in a common employment with the injured employee. It was held that no action would lie in Manitoba because at common law the negligence of the plaintiff's fellow servant would not have supported an action against the employer and the Manitoba statute was inapplicable to an injury occurring outside of Manitoba (o). It is submitted, however, that the reference in the first condition in *Phillips v. Eyre* to the domestic law of the forum, that is, Manitoba, ought to have been construed as a reference to the domestic law of Manitoba as applied to a domestic Manitoba situation, that is, the case of an employee injured in Manitoba, who would of course be entitled to the benefit of the Manitoba statute abolishing the defence of common employment.

It is outside the scope of the present comment to discuss the merits or demerits of the *Phillips v. Eyre* formula or to discuss the question whether it can be legitimately applied to cases of liability without fault; but it is submitted that the first condition in *Phillips v. Eyre* cannot reasonably be construed as merely safeguarding the stringent local public policy of the forum or in any sense other than that there must be an actionable wrong by the domestic law of the forum in a supposititious local situation corresponding to the actual foreign situation, without any reference to the foreign law.

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(n) (1914) 24 Man. R. 257, 17 D.L.R. 516, 6 W.W.R. 898; contrast *Story v. Stratford Mill Building Co.* (1913), 30 O.L.R. 271, 18 D.L.R. 309.

(o) Cf. to the same effect, *Jones v. Canadian Pacific Ry. Co.* (1919), 49 D.L.R. 335, [1919] 3 W.W.R. 994 (Man.).

TORT IN ONTARIO: ACTION IN QUEBEC:  
GRATUITOUS PASSENGER\*

The decision of the Supreme Court of Canada in *McLean v. Pettigrew* (a) involves fundamental questions of the conflict of laws relating to the situation in which an alleged wrong is committed in one country and an action is brought for damages against the alleged wrong doer in another country. Specifically, an action was brought in Quebec in respect of a motor accident which occurred in Ontario, the plaintiff being a gratuitous passenger in the defendant's car. If the accident had occurred in Quebec and the court had simply applied the domestic law of Quebec, the defendant would, by reason of his negligence, have been subject to quasi-delictual responsibility by the domestic rules of the law of the forum, and the main question of the conflict of laws was whether, and to what extent, the defendant's responsibility in Quebec was affected by the fact that the accident occurred in Ontario. That question involves the doctrine of *Phillips v. Eyre* (b), and its applicability in Quebec, and the case of *Machado v. Fontes* (c), in which the doctrine of *Phillips v. Eyre* was applied in England in circumstances closely parallel to those of *McLean v. Pettigrew* itself.

In *Phillips v. Eyre* (d) Willes J., delivering the judgment of the Exchequer Chamber, said:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

*Phillips v. Eyre* is not cited by the judges of the Supreme Court of Canada in *McLean v. Pettigrew*, but it is of course

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\*This chapter reproduces a case comment published (1945), 23 Canadian Bar Review 309-316, and [1945] 2 Dominion Law Reports 82-87.

(a) [1945] S.C.R. 62, [1945] 2 D.L.R. 65.

(b) (1870), L.R. 6 Q.B. 1.

(c) [1897] 2 Q.B. 231.

(d) L.R. 6 Q.B. 1, at pp. 28-29.

the foundation case in English conflict of laws with regard to an action brought in one country in respect of an alleged wrong committed in another country, in the sense that in later cases, such as *Carr v. Francis Times & Co.* (e) and *Walpole v. Canadian Northern R. Co.* (f), both cited in *McLean v. Pettigrew*, the courts have merely purported to affirm and apply the formula stated by Willes J. in *Phillips v. Eyre* (g).

It may now be regarded as settled that the formula above mentioned, with the substitution of "Quebec" for "England," is part of the Quebec system of conflict of laws. That this was the result of the decision of the Supreme Court of Canada in *O'Connor v. Wray* (h), was stated by Duff C.J., in *Canadian National Steamships Co. v. Watson* (i), though apart from his statement I should have thought it doubtful (j). Furthermore, in the *Watson* case the alleged tort was committed on a ship on the high seas, and s. 265 of the Merchant Shipping Act, 1894 (U.K.), provided that the case should be governed by the law of the port of registry, so that in the particular circumstances there did not seem to be any justification for references to two separate laws in accordance with *Phillips v. Eyre* (k). Duff C.J.'s statement has now been affirmed in *McLean v. Pettigrew*; and any doubt as to the prevalence of the *Phillips v. Eyre* formula in Quebec has disappeared (l). There is, of course, no doubt that the formula prevails in the other provinces of Canada.

It is unfortunate, however, that in *McLean v. Pettigrew* Taschereau J. seemed to give some judicial sanction to the confusing version of the formula contained in Dicey, Conflict of Laws (5th ed. 1932), rule 188, as follows:

An act done in a foreign country is a tort, and actionable as such in England, if it is *both*

(1) wrongful, i.e., not justifiable, according to the law of the foreign country where it was done; *and*,

(e) [1902] A.C. 176.

(f) [1923] A.C. 113, 70 D.L.R. 201, [1922] 3 W.W.R. 900.

(g) Cf. chapter 2, § 1(3), at p. 17, *supra*.

(h) [1930] S.C.R. 231, [1930] 2 D.L.R. 899.

(i) [1939] S.C.R. 11, at p. 13, [1939] 1 D.L.R. 273, at p. 274.

(j) See chapter 43.

(k) See chapter 44.

(l) For a full discussion of the earlier Quebec cases, see Johnson, Conflict of Laws with Special Reference to the Law of the Province of Quebec, vol. 3 (1937) 340 ff.

(2) wrongful, i.e., actionable as a tort, according to English law, or, in other words, is an act which if done in England, would be a tort.

This form of statement includes the artificial use of the word "wrongful" in both branches of the rule, with two distinct meanings, although the word "wrongful" does not occur in either of the two conditions stated in *Phillips v. Eyre*. It is submitted, with respect, that Dicey's version has not been adopted by the courts, and that Duff C.J. did not in the *Watson* case purport to define the word "wrongful." The wording used in *Phillips v. Eyre* is now the judicially approved formula, although it is true that the double use of the word "wrongful" does occur in some judgments (*m*). Strange to say, the case which Dicey cites as the primary authority for the wording of his rule 188 is *Scott v. Seymour* (*n*), in which the judges do not use the word "wrongful." The point decided in that case was that in an action in England in respect of an alleged tort committed in Italy, a plea that no civil proceedings could be taken in Italy until after penal proceedings were commenced and determined, was bad. Only Wightman J., anticipating the decision in *Machado v. Fontes*, expressed the opinion that if the plea meant that criminal proceedings, but no civil proceedings, could be taken in Italy, the plea would be bad. Willis, *Two Approaches to the Conflict of Laws* (*o*), says:

In an attempt to work out of the cases a doctrine less inconsistent with his own, [Dicey] changes the order and wording of the two traditional questions, so as to convey to the casual unwary reader the impression that the English law accepts Holmes J.'s obligation theory, subject to a public policy exception, that English law will not give damages in respect of a proceeding which English law does not condemn. Indeed we could hardly expect him to do otherwise, for in this topic, as in no other, the English law finally and in no unemphatic manner denies its adherence to the doctrine of foreign-created rights which he strove hard to create.

It should be noted here that Westlake, *Private International Law*, § 196, does use the word "wrong" in the reference to the law of the place where the act was done. That learned author does not in fact, anywhere in his discussion of the topic of torts, quote the whole of the *Phillips v. Eyre* formula or attribute to it the importance which it has now acquired by virtue of its adoption in modern judgments of the highest authority. On the other hand, unlike Dicey, Westlake does not, anywhere in his

(*m*) See, for example, *The Moxham* (1876), 1 P.D. 107, at p. 111; *Machado v. Fontes*, [1897] 2 Q.B. 231, at p. 233.

(*n*) (1862), 1 H. & C. 219.

(*o*) (1936), 14 Can. Bar Rev. 1, at pp. 20-21.

book, commit himself to any general theory of acquired rights. In his chapter 2 he states his famous *désistement* theory, though not using that name, but this theory, so far as it has any bearing on the acquired rights theory, is limited to a negative aspect of the latter theory (*p*). In his introductory notes in chapter 40, preceding his § 196, he concedes to the *forum delicti* a primary jurisdiction as compared with the *forum rei*, and, in the notes to his § 200, states a cautiously worded opinion adverse to the conclusion reached in *Machado v. Fontes* (*q*).

Hancock, in his article, *A Problem in Damages for Tort in the Conflict of Laws* (*r*), speaks of the "laconism" of the two conditions stated in the formula. They are no doubt laconic (that is, pithy, concise), and might well have been elaborated, but their meaning can I think be spelled out with accuracy. It is true that Willes J. in other parts of his judgment states a theory of a right created by the law of the place of wrong, but this theory does not appear to have been intended to afford a complete solution of the problem, in view of the terms of the two conditions stated by him. Obviously the theory is irrelevant to the first condition, and it would seem that it is used only as a theoretical basis for the second condition. Hancock, in his book on *Torts in the Conflict of Laws* (*s*), seems to take Willes J.'s theorizing too seriously and concludes from it that the plaintiff must "show an obligation to pay damages created by the law of the place of wrong," although of course there is nothing in the two conditions to justify this conclusion. In *Phillips v. Eyre* the first condition was clearly fulfilled, and it did not require special discussion. On the other hand the second condition, the non-fulfilment of which involved the dismissal of the action, was fully discussed, with reference to many cases, beginning with those relating to an act which was originally justifiable under the foreign law and ending with those in which an obligation was incurred abroad and was subsequently discharged under the foreign law.

My own view is that the effect of the first condition is that the cause of action is wholly governed by the domestic rules of the law of the forum applied to a hypothetical domestic

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(*p*) See chapter 2, § 1(5), at p. 22, *supra*.

(*q*) Already cited, and to be discussed below.

(*r*) (1944), 22 Can. Bar Rev. 843, at p. 861.

(*s*) (1942) 11. See analysis of the judgment of Willes J. in chapter 2, § 1(3), at pp. 15 ff., *supra*.

situation, subject only to the proviso expressed in the second condition, that is, that the act must not have been justifiable by the law of the place where the act was done applied to the actual situation. The first condition states a conflict rule of the law of the forum referring to the law of the forum, and necessarily the reference must be to the domestic rules of the law of the forum, and the factual situation to which those domestic rules are to be applied must, it is submitted, be a hypothetical situation, that is, a situation consisting of facts which are purely domestic from the point of view of the forum, or, in other words, a situation which presents to the court no question of the conflict of laws. The reference in the second condition to the law of the place where the alleged tort was committed is of course not necessarily construed as a reference only to the domestic rules of the law of that place.

If this view is right, it follows that, subject only to the proviso expressed in the second condition, the existence and extent of the obligation, including the measure of damages, are governed by the domestic rules of the law of the forum. This view of the effect of the two conditions is of course consistent with *Machado v. Fontes* (t), but is in no way dependent on that decision. If the existence and extent of the obligation are governed by the domestic rules of the law of the forum, it is immaterial whether the measure of damages is characterized as a matter of procedure, or, as I think it should be, as a matter of the substance of the obligation; and consequently *Machado v. Fontes* is simply an example of the application of the two conditions stated in *Phillips v. Eyre* (u).

*Machado v. Fontes* is so casually cited in *McLean v. Pettigrew* that one would not suspect on the mere reading of the judgments in the latter case that the Supreme Court of Canada has approved of the decision in the former case. The two cases would seem, however, to be indistinguishable. In the former case the Court of Appeal in England held that the defendant was obliged to pay damages in England for an act done in Brazil, which, if it had been done in England, and was characterized in accordance with the domestic law of England, would have constituted the tort of libel, notwithstanding that by the domestic law of Brazil, as alleged by the defendant and

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(t) [1897] 2 Q.B. 231.

(u) See the discussion of *Machado v. Fontes* in chapter 2, § 1(3), pp. 18, 19, *supra*, and in the present chapter, *infra*.

assumed for the purpose of the judgment, the act could not be the subject of civil proceedings or be the basis of an action for damages, but might be the subject of criminal proceedings. In *McLean v. Pettigrew* the court held that the defendant was obliged to pay damages in Quebec for an injury suffered by the plaintiff in a motor accident which occurred in Ontario and which, if it had occurred in Quebec, and was characterized in accordance with the domestic law of Quebec, would, by reason of the defendant's negligence, have subjected him to quasi-delictual responsibility, whereas by the law of Ontario the plaintiff, being a gratuitous passenger in the defendant's car, was not entitled to bring a civil action for damages against the defendant, but the defendant, though he had been acquitted by an Ontario magistrate, was, in the opinion of the Quebec courts and of the Supreme Court, guilty of an offence and liable to a penalty under an Ontario statute for driving a motor vehicle on a highway "without due care and attention" (v).

*Machado v. Fontes* has been frequently criticized (w). The observations of some of the critics are, however, coloured by their professed predilection for the theory generally prevailing in the United States that tort liability is governed by the law of the place of wrong, and sometimes by their not entirely concealed liking for the theory of acquired rights, *alias* the *obligatio* theory (x).

On the other hand, Pollock (y), writing shortly after *Machado v. Fontes*, says that the decision is "sensible," though he adds that there is a difficulty in seeing how it is to be "logically justified", it being anomalous in his view "that A should,

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(v) On the point that the civil court was not bound by the previous decision of the criminal court, the Supreme Court cited its own previous decision in *La Foncière Compagnie d' Assurance de France v. Perras*, [1943] S.C.R. 165, [1943] 2 D.L.R. 129. For a criticism of the doctrine that the decision of a criminal court is not admissible evidence in civil proceedings, see Wright's comment (1943), 21 Can. Bar Rev. 653, on *Hollington v. F. Hewthorns & Co.*, [1943] K.B. 587.

(w) See, e.g., Cheshire, *Private International Law* (first ed. 1935) 220-223, (2nd ed. 1938) 303-305; Keith, in a review of the *Conflict of Laws Restatement* (1936), 1 U. of Toronto L.J. 233, at p. 257; 2 Beale, *Conflict of Laws* (1935) 1292; Goodrich, *Handbook of the Conflict of Laws* (2nd ed. 1938) 221; Robertson, *The Choice of Law for Tort Liability in the Conflict of Laws* (1940), 4 Modern L. Rev. 27; Hancock, in his article (1944), 22 Can. Bar Rev. 843, at pp. 853 ff., where his criticism is more vigorously expressed than in his book, *Torts in the Conflict of Laws* (1942) 15-18, 121, 122.

(x) See chapter 2, § 1(2), at pp. 11 ff., *supra*.

(y) (1897), 13 L.Q. Rev. 233; *cf.* further comment at p. 334.

in respect of acts done in Brazil, acquire rights in England not given him by the law of Brazil." Gutteridge, in a review of the first edition of Cheshire's book (z), states his opinion that Cheshire's criticism of *Machado v. Fontes* is "unconvincing." "It would be a strange result," he says, "if an Englishman who in a foreign country publishes a libel concerning another Englishman can thereby save his pocket from the payment of damages." Lorenzen, *Tort Liability and the Conflict of Laws* (a), discusses *Machado v. Fontes* fully and impartially, and is of opinion that the conclusion reached in that case "is entirely defensible from the standpoint of the fundamental theory of the conflict of laws," but that different views may be reasonably entertained on the question whether the conclusion reached is a desirable one or whether some other conclusion might have been preferable. The "fundamental theory" above mentioned is that an English court enforces English rights, not Brazilian rights, that it is not bound to recognize a Brazilian right, and in accordance with the law of the forum may create a right different from that given by Brazilian law (b).

One may perhaps be permitted to express respectfully some regret that the Supreme Court of Canada did not avail itself of the opportunity to discuss the merits or demerits of the rule which it enforced and did not even disclose any awareness that its decision related to a topic upon which much has been written *pro* and *con*. The result can hardly be called unjust in the particular circumstances, because the domestic law of Quebec was applied to a controversy between two persons, domiciled in Quebec who were only temporarily present in Ontario; and the result probably accorded with the expectations of the parties, so far as they had any expectations. This aspect of the case was, however, ignored in the Supreme Court, and the rule applied by the court would probably be applied by it also to a case in which the parties are resident and domiciled in Ontario and the accident occurs there, and the action is brought in Quebec merely because the plaintiff is so fortunate as to find some basis for the jurisdiction of the court in Quebec to entertain an action against the defendant and chooses the Quebec forum because he could not succeed in an action in Ontario (c).

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(z) (1936), 6 Cambridge L.J. 20.

(a) (1931), 47 L.Q. Rev. 483, at pp. 484-490.

(b) Cf. chapter 2, § 2(2), at pp. 27 ff., *supra*.

(c) This point must have been present to the minds of the judges of the Supreme Court, because in the judgment of the majority occurs

It is outside of the scope of the present comment on *McLean v. Pettigrew* to discuss the *obligatio* theory or the theory that the governing law should be the law of the "place of wrong," or to compare these theories with the English theory, embodied in the two conditions stated in *Phillips v. Eyre*. Rheinsteint (d) says that in the "field of torts, English courts continue to apply English law, with the important modification, however, that an alleged tort-feasor will not be subjected to liability, when his conduct, though actionable under English law, is not disapproved by the law of the place where it was carried on. This technique is of easy application, it protects justified expectations, and it appears eminently satisfactory, in spite of criticism." The English theory is relatively easy of application, but whether in all circumstances it achieves substantially just results is another question.

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a reference to the Quebec case of *Lieff v. Palmer* (1937), Q.R. 63 K.B. 278, in which two Quebec judges refused to follow *Machado v. Fontes*. Hancock, (1944), 22 Can. Bar Rev. at p. 853, speaks of "this unjust feature" of *Machado v. Fontes*, whereas possibly the quoted expression is appropriate to the situation in *Lieff v. Palmer*, and is not appropriate to the situation in *Machado v. Fontes*. The silence of the Supreme Court as to the possible distinction between litigation in Quebec in respect of an accident occurring in Ontario (1) where the parties are residents of Quebec and (2) where the parties are residents of Ontario, is apparently deliberate.

(d) The Place of Wrong: a Study in the Method of Case Law (1944), 19 Tulane L. Rev. 4, at p. 23.

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## CHAPTER XLVI.

### PROOF OF FOREIGN LAW; COMPETENCY OF WITNESSES\*

The headnote of *Gold v. Reinblatt (a)* in the Supreme Court Reports is as follows:

In order to prove the law of a foreign country it is not necessary that the witness should be a lawyer actually practising his profession in that country; but, inasmuch as foreign law is a question of fact which must be proved as any other fact by a competent and qualified witness, any person whose occupation makes it necessary for him to have knowledge of the law of such foreign country may be a competent and qualified witness, the competency and qualification of such witness being a matter for the appreciation of the court.

The propositions of law just quoted are not, either verbally or in substance, to be found in the judgment of the Supreme Court of Canada, but are merely the reporter's statement of the grounds upon which the witness's evidence was admitted, these grounds being presumably inferred from the judgments in the Court of King's Bench, which were approved in a general way in the Supreme Court. When, however, the report of the case in the Court of King's Bench (*b*) is examined, it does not clearly appear that the grounds of judgment are accurately set out in the headnote in the Supreme Court Reports, or what those grounds were.

The foreign law to be proved was the law of Austria. Before the outbreak of the war (*c*) the witness was studying law at the University of Czernowitz in the province of Bukovina in Austria-Hungary, and after the war he completed his course there and acquired the degree of doctor of law. In 1919 he was admitted to practise law, and began practising, in the same province of Bukovina, which had, by the treaty of peace, been transferred to Rumania, but in which the Austrian Civil Code remained in force. In 1922 he came to Canada, and at the

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\*This chapter reproduces a case comment published (1929), 7 Canadian Bar Review 399-403.

(a) [1929] S.C.R. 74; [1929] 1 D.L.R. 959. The headnote in the latter report relates to another point.

(b) *Reinblatt v. Gold* (1928) Q.R. 45 K.B. 136, reversing (1926), Q.R. 65 S.C. 17.

(c) The first world war.

time of the trial of the action, in 1925 or 1926, was an insurance agent in Montreal and was studying law at McGill University.

Before proceeding with the discussion of *Gold v. Reinblatt*, it is, I think, worth while to attempt to restate concisely the rules generally applied by English and Canadian courts to the question of the competency of a witness to prove foreign law. I submit the following:

Rule 1. A person is competent to prove the law of a foreign country if, and, as a general rule, only if, he knows that law by virtue of his being, or having been,

- (a) a judge or legal practitioner in that country; or
- (b) a teacher of law in that country, or the holder thereof of some other office the duties of which entail a knowledge of the law of that country.

It is said that the "best evidence" (d) is that of a person qualified under clause (a), but under either clause (a) or clause (b), the witness has acquired his knowledge by virtue of his office—he is *peritus virtute officii*.

Rule 2. A person is not competent to prove the law of a foreign country (a) if he has merely studied the law in that country, and, *a fortiori*, (b) if he has merely studied the law of that country in another country.

The decision in *Bristow v. Sequeville* (e) specifically supports clause (b) and the discussion in that case suggests that the knowledge of law should be acquired in the foreign country. In *the Goods of Bonelli* (f) and *In re Turner* (g) specifically support clause (a), and in the latter case the opinion is expressed that the witness should be a professional man or hold an official position in the foreign country. In the report of *Embiricos v. Anglo-Austrian Bank* (h) in the Court of Appeal a statement of Austrian law is quoted from an affidavit of a doctor of law at the University of Vienna, but it is pointed out in the judgment of the trial judge (i) that there was no dispute

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(d) *Rex v. Naoum* (1911), 24 O.L.R. 306 at p. 311, where many of the cases are cited.

(e) (1850), 5 Exch. 275.

(f) (1875), 1 P.D. 69.

(g) [1906] W.N. 27.

(h) [1905] 1 K.B. 677 at pp. 678-9.

(i) [1904] 2 K.B. 870 at p. 873.

as to the foreign law, the expert witnesses of both parties being in agreement.

Rule 3. Much must be left to the discretion of the trial judge, but if the foreign law is foreign in essence as well as in name, a stricter rule as to competency should be applied than if the foreign law is germane to the law of the forum.

In substance this rule is stated in Wigmore on Evidence, 2nd ed., 1923, § 690. The author says that the courts in England have on the whole been more strict than the courts in the United States on this question of "expert capacity," and expresses the opinion that for a system of law foreign in essence as well as in name residence in the foreign country and perhaps practice might occasionally be required.

Rule 4. A person who knows the law of the foreign country by virtue of holding in another country an office which entails a knowledge of the law of the foreign country may, in special circumstances, be held to be competent to prove that law.

The exceptional character of this rule is emphasized in *Wilson v. Wilson* (j). In *Brailey v. Rhodesia Consolidated* (k) a reader in Roman-Dutch law to the Incorporated Council of Legal Education in England was held to be competent to prove the law of Rhodesia, although he had never practised law or held an official position in Rhodesia. His evidence was that the law of Rhodesia was the same as the law of England on the point in question, and therefore the effect of the admission of his evidence was the same as if his evidence had been rejected.

Foote (l) doubtless goes too far in stating that "the only witness competent to give such evidence is some person who is conversant with the foreign law, either as a legal practitioner in the foreign state, or as holding some other office there the duties of which would entail such knowledge;" but it is submitted that it may fairly be said that rule 1, stated above, is the general rule, and that a court should not, in the exercise of such discretion as it may possess, depart from this rule except in special circumstances. The rule is not of a technical character, but is

(j) [1903] P. 157; cf. *Cartwright v. Cartwright* (1878), 26 W.R. 684, in which an English barrister practising in Canadian appeals before the Privy Council was held not to be competent to give evidence as to the validity, according to the laws of Canada, of a marriage solemnized in Canada.

(k) [1910] 2 Ch. 95.

(l) *Private International Law*, 5th ed. 1925, p. 576.

based upon the substantial consideration that, generally speaking, a person who has lived in a country and has, in the course of his occupation, had occasion, frequently or habitually, to apply its law to particular circumstances, in the light of the practice of the courts and the course of their decisions, will in fact be able to discriminate between the values of different sources and to give an accurate statement of the law to the court of another country. Even in the case of a codified law, a person who has not lived in a country and had immediate contact with the law in its practical application is less likely to be able to give an accurate statement of it.

The rule that the witness should be *peritus virtute officii* is stated in the leading case of the *Sussex Peerage* (*m*). It would not appear to be quite accurate to say, as was said in *Rex v. Naoum* (*n*) that "Bishop Wiseman, who had held a quasi-judicial position at Rome, was held qualified to prove the canon law as to marriage which was in force in that city." The decision was rather that the bishop, by virtue of his holding the office of coadjutor to a vicar-apostolic in England, was to be considered as a person skilled in the Roman canon law of marriage and therefore competent to prove that law. The witness's office in England entailed a knowledge of Roman canon law for the purpose of ecclesiastical administration in England.

The witness in *Gold v. Reinblatt* seems to have been qualified under rule 1, subject to one objection, namely, that he had practised law not in Austria, but in Rumania. This objection, if taken, would be purely technical, because the province of Bukovina, in which he practised, had been only recently separated from Austria-Hungary and was still governed by the Austrian Civil Code; and it does not appear from the reports of the case that the doubt as to his competency as a witness of Austrian law turned on the objection in question.

The headnote, already quoted, would seem to indicate that the objection was that he was not a lawyer "actually" practising his profession in the foreign country. I conjecture that the word "actually" is a translation of the word "actuellement" occurring in the judgment of Cannon J. in the Court of King's Bench. The French word means primarily "now" or "presently," whereas the English word means "really" or "in fact."

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(*m*) (1844), 11 Cl. & F. 85 at p. 134.

(*n*) (1911), 24 O.L.R. 306 at p. 311.

It is, I think, obvious that a person may be a competent witness of the law of a foreign country where he formerly practised law, although he may at the time of giving his evidence, have ceased to practise law there, or even be studying law or selling insurance in another country; but it is quite a different thing to say that it is not necessary that the witness should ever have been in actual practice.

If the headnote means that the witness's study of law at a university would qualify him, the doctrine enunciated is inconsistent with the current of the English cases and, it is submitted, has not yet received the support of the Supreme Court of Canada.

Still less, it is submitted, has the Supreme Court of Canada held that, as Cannon J. suggests, any educated person who has lived in Austria and who testifies that he knows the law of Austria as to community or separation of property between spouses, is a competent witness to that extent.

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